Supreme Court, U. S.
FILED
MAR 28 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1979

No. 79-1725

CITY OF BOCA RATON,
Petitioner,

vs.

BOCA VILLAS CORPORATION, and SAMUEL FLETCHER, Trustee, and KEATING-MEREDITH PROPERTIES, INC., and ARVIDA CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

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The CITY OF BOCA RATON, Petitioner, prays that a writ of certiorari issue to review the judgments of the Florida Supreme Court and the District Court of Appeal of the State of Florida, Fourth District entered in the above cause on January 30, 1980 and on April 19, 1979 respectively.

OPINIONS BELOW

The opinions of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County invalidating the City's entire residential zoning plan on the basis that a charter amendment limiting the City's permissible dwelling units to 40,000 (the Cap) enacted pursuant to referendum, violates Florida and Federal constitutional guarantees of due process and equal protection are unreported. The

opinions of the District Court of Appeal of Florida, Fourth District, affirming the trial court's judgments, are reported at 371 So. 2d 154 (Fla. 4th DCA 1979) (A1-13) and 371 So. 2d 160 (Fla. 4th DCA 1979) (A13-16). The refusal of the Florida Supreme Court to grant certiorari is as yet unreported.

JURISDICTION

The judgment of the Supreme Court of Florida denying certiorari was entered on January 30, 1980. The judgments of the Fourth District Court of Appeal of Florida were rendered on April 18, 1979 and copies thereof are appended to this petition in the Appendix at A1-16. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. In the sweeping invalidation of a City's entire residential zoning plan, is the test of "rational relationship to a permissible state objective" tantamount to the test of a "compelling need justifying the exercise of the police power" in gauging the constitutionality of said zoning legislation under the equal protection and due process clauses of the Fourteenth Amendment?

2. Does the alleged Fourteenth Amendment invalidity of a charter amendment limiting the permissible dwelling units within a City to 40,000 (the Cap) shift to the City the affirmative burden of proving a "compelling need" for said Cap?

3. Where it has been adjudicated that the City has the power to enact a dwelling unit "Cap" under its police power, can the courts invalidate the City's

entire residential zoning plan and its 40,000 "Cap" and thereby usurp the City's legislative function where no confiscation is established (except as applied to the lands of two of the three Plaintiffs) on the basis that said legislation is arbitrary and violates the Fourteenth Amendment since there was no "compelling need" therefor?

4. Where it has been adjudicated that the City has the power to enact a Cap, should the rationality of the implementary zoning ordinances be determined without applying the tests of confiscation (or unreasonable use classification) and fairly debatable to the property in question?

5. May a Court invalidate the City's entire residential zoning plan and its dwelling unit "Cap" as arbitrary and violative of the Fourteenth Amendment in suits brought by three Plaintiffs suing in their individual capacities where no evidence of confiscation or unreasonable use classification was presented as to any parcels of land save that owned by two of the three Plaintiffs on the basis that there was no "compelling need" for that exercise of the City's police power?

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

* * *

Florida Constitutional Provision and Statutes involved are set out in the Appendix at (A53-54).

PREFACE

For purposes of this Petition the City assumes *arguendo* the propriety of all fact findings contained in the opinion below. The gravamen of the City's Petition is that the courts below failed to apply the standards formulated by this Court in testing the validity of legislation under the equal protection and due process clauses of the Fourteenth Amendment.

STATEMENT[1]

a) Background

The City of Boca Raton consists of 25.46 square miles located along the southern portion of Palm Beach County, Florida. It borders on the Atlantic Ocean and is one of the fastest growing communities in the United States. Between 1950 and 1970 the City's population increased from 992 to 29,518. It jumped to no less than 43,000 persons by 1974. The City found itself a part of Florida's famed "Gold Coast", faced with the problem of rapid growth which had already ravaged its neighbors to the south, *e.g.*, Miami Beach and Fort Lauderdale. There was growing concern about guiding the City's inevitable growth and yet keeping its balanced low density character (A21).

These apprehensions were exacerbated in 1971 by two large developers, Behring and Arvida Corporation (one of the respondents herein) who were planning to construct 25,000 dwelling units in the unincorporated western portion of Boca Raton's reserve area. To a community which contained 12,343 dwelling units these undertakings were an immediate source of controversy and anxiety

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1. The following abbreviations will be used:
   A = Appendix
   d.u.p.a. = dwelling units per acre
All emphasis supplied unless otherwise indicated.

(A22). Thus control over westward expansion became the focus of the local election. All candidates took a firm stand favoring annexation and low density as the ultimate solution. Subject to referendum, the Florida Legislature approved annexation of University Park (a company town owned principally by Arvida) and denied annexation of the unincorporated area (A22).

Eighteen days after annexation of University Park, Arvida applied for zoning in the newly annexed land requesting higher densities for its residential lands than were in effect throughout the City. Over heated protests of the citizenry, Arvida's request was granted in February 1972. The very next day, citizens began circulating referendum petitions resulting in repeal of the Arvida ordinances a few months after their enactment (A23). Just about this time an emergency ordinance imposed a 60-day zoning moratorium, ostensibly to study problems of water, sewage, schools and density (A23). No studies were done. Other efforts by citizens to focus the attention of the City officials on the problems of growth were ignored (A24).

In July 1972 the Royal Palm Audubon Society submitted to the City Council a report entitled "The Problems of Growth" and recommended a maximum population of 105,000.[2] Major areas of concern were water quality and quantity, schools, traffic, social impact and effect of population growth. The report was prepared by six interested citizens of moderate means out of a sense of civic duty and pride; no funds were available for a comprehensive scientific study; the purpose was to point out the reasons for the public's apprehension. The Council, again did not respond (A24).

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2. The present Cap of 40,000 was based on a household mean of 2.6 persons per dwelling unit. The United States census of 1960 and 1970 are the basic sources for using 2.6 as the average household size, although that is an upper limit since 2.6 is for single-family dwelling units, while 2.05 is for multi-family (A25).

As a result, distrust in their elected and appointed officials by a significant portion of the citizenry became evident (A39). An ordinance providing for a referendum on a charter amendment limiting the total number of dwelling units to 40,000 (the Cap) was introduced but failed to be considered for lack of a second (A24). Alarmed at the City Council's persistent indifference, a group of residents began circulating petitions to submit the 40,000 Cap to the electorate. At that time the City's zoning code permitted 62,500 dwelling units (A42). On November 7, 1972, by a vote of 7,722 to 5,626, the City's charter was amended to add the Cap as follows:

> "SECTION 1209 Limitations of Number of Dwelling Units
>
> The total number of dwelling units within the existing boundaries of the City is hereby limited to forty thousand (40,000). No building permit shall be issued for the construction of a dwelling unit within the City which would permit the total number of dwelling units within the City to exceed forty thousand (40,000)." (A2).

For about a year thereafter the City kept in effect interim moratorium ordinances to maintain the status quo, (including temporary density reductions amounting to 50% on an "across the board" basis) pending implementation of the Cap (A12, 26). In August 1973 the City contracted with Ashley Economic Services and Veri & Associates at a cost of $100,000, for an environmental, fiscal, legal, economic and social study of the City to be completed within four months (A26). Finally, based on the reports of the Ashley-Veri company, and the City's original planning firm, Milo-Smith, in March 1973 the Cap was permanently implemented by a 50% reduction for all multi-family zoning categories (A27). Single-family zoning categories

were reduced to conform to the average of what had been constructed in the City prior to the charter amendment (A2). In addition, an ordinance was enacted providing for mandatory review of the Cap and resubmission to the electorate every two years (A26).

b) Litigation

In its lawsuit, Boca Villas Corporation alleged that the rezoning of 32 acres from multi-family (R-3) at 19 d.u.p.a to single family (R1-D) at 3.1 d.u.p.a. was violative of the equal protection and due process clauses of the Constitutions of the State of Florida and the United States, the Fifth and Fourteenth Amendments and the Commerce clause of the United States Constitution (A18). In an entirely separate lawsuit, Keating-Meredith Properties, Inc., made the same contentions about the reduction in density of its R-3 multi-family zoned property from 19 d.u.p.a. to 9.5 (A19-20).

Plaintiffs argued that the Cap and its implementation a) infringed upon the right to travel; b) kept the City from absorbing its "fair share" of housing; c) were not "necessary" and were exclusionary and *that the City had the burden of establishing a "compelling state interest"*;[3] d) the initiative process deprived them of due process (A18).

The City contended that the challenged legislation a) bore a rational relationship to the permissible municipal objectives of control of density, maintenance of a balanced community, and the validity thereof was fairly debatable; b) the Cap and its ordinances were no more exclusionary than ordinary similar zoning (A19). These two cases were consolidated for trial. "After some twenty-seven

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3. Perhaps this argument explains the use of the "compelling need" yardstick. But unrestricted use of one's property is not a "fundamental" right guaranteed by the Constitution. The trial court appeared to understand the difference (A18, fn. 1).

days of trial the court entered an exhaustive judgment holding that the charter amendment violated due process provisions of the State and Federal Constitutions because the Cap did not bear a rational relationship to a permissible municipal objective and that the ordinance in question violated both due process and equal protection of the law" (A2). As an "alternative ground" for its judgment, the implementing ordinances were found confiscatory only as to the specific Boca Villas and Keating-Meredith properties (A46). There was no such finding as to any other property in the City nor was any other property before the Court.

The trial court adjudicated "The City has the naked power under Section 2 of Article VIII of the Florida Constitution[4] to legally utilize a form of Cap to control growth." (A51). The Fourth District Court of Appeal affirmed (A2).[5]

After citing the trial court's reasons for rejecting the particular number chosen by the City, the Fourth District reached the nub of the matter:

> Our study of the briefs and record convinces us that there is substantial competent evidence to support the finding of an absence of a rational relationship regarding the charter amendment and zoning ordinance. That being the case, we need not reach the question of confiscation vel non *because the finding that there*

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4. Article VIII, section 2(b) provides (A52):

(b) POWERS. Municipalities shall have the governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for the municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective.

5. Early in the proceeding, Arvida sought summary judgment on the basis that the City lacked power to enact a Cap, Arvida then appealed the court's denial of summary judgment. This order was affirmed *Arvida Corp. v. City of Boca Raton*, 312 So. 2d 826 (Fla. 4th DCA 1975).

> *is no compelling need justifying an exercise of the police power burdening private property is sufficient to warrant striking down the legislative act.*

This holding pervades all opinions below. The Fourteenth Amendment's due process and equal protection clauses quite clearly do *not* require a City to demonstrate a "compelling need" to justify the exercise of its police power.

Sometime during the pendency of the above consolidated actions, Arvida Corporation filed an action in the United States District Court attacking the constitutionality of the Cap (A41). The Federal Court abstained pending resolution of all state court issues (A41). Thereafter Arvida filed a state court complaint in two counts (A41).[6] Count I reserved federal constitutional questions for determination by the federal court and limited the issue to municipal power to enact a Cap under the Florida Constitution. "No question of confiscation is before the court" (A42). Arvida's motion to intervene and consolidate its case with the previously consolidated *Boca Villas* and *Keating-Meredith* cases was denied (A42).

Several months after the *Boca Villas* judgment, Arvida's case was tried before the same trial judge that heard the *Boca Villas* cases. Arvida's case, although dealing largely with single-family zoning was decided "upon the evidence previously adduced and findings of fact previously reached" together with additional evidence adduced by Arvida (A43). No evidence regarding the effect of the Cap and its implementing ordinances as they related to single-family zoned land was presented in *Boca Villas*. Indeed, Arvida presented no evidence whatsoever as to

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6. Count II is not here involved since it related to equitable estoppel which was decided in the City's favor. *Arvida Corp. v. City of Boca Raton*, 357 So. 2d 196 (Fla. 4th DCA 1978).

confiscation of either single-family or multi-family zoned land since that issue had been expressly placed beyond the state court's jurisdiction (A46).[7]

There was no question that the purpose achieved by the Cap's implementing single-family zoning was the reduction of densities in the single-family categories to conform to the average of what had been constructed in the City prior to the Cap (A2-14). Disregarding the purpose and actual results accomplished by the single-family zoning ordinance, the trial court invalidated the rest of the City's residential zoning plan because the single-family ordinance's *preamble* referred only to the Cap (A46-47)! In short, Arvida did not present a scintilla of evidence to prove that the Cap and its implementary legislation had any injurious effect upon the use or value of its property - multi-family or single-family (A15-16). Nevertheless on the basis of the *Boca Villas* judgment, the trial court also invalidated the single-family ordinances to complete the decimation of Boca Raton's entire residential zoning plan A16).

The Fourth District Court of Appeal affirmed on the basis of its *Boca Villas* opinion (A16). While both courts below paid lip service to the applicable law and repeatedly referred to the proper standards, it is clear that the real basis for the appellate affirmances is the use of the constitutionally invalid yardstick - "compelling need".

The City, consolidating all these cases, sought certiorari to the Supreme Court of Florida which was denied.

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7. Arvida's case concerned itself mainly with attempting to assert the validity of pre-Cap densities that had been expressly attacked as invalid in its complaint (A43). That issue is not the subject of this Petition.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to determine whether, in the sweeping invalidation of a City's entire residential zoning plan, the test of a "rational relationship to a permissible state objective" is tantamount to the test of a "compelling need justifying the exercise of the police power," (A7) (thereby shifting the burden of proof to the City) in gauging the constitutionality of said zoning legislation under the due process and equal protection clauses of the Fourteenth Amendment.

1. In sum, the Court below approved the trial court's annihilation of the City's entire residential zoning plan on Fourteenth Amendment grounds on the basis that the Cap and the implementing zoning ordinances "did not bear a rational relationship to a valid municipal purpose" because "*the finding that there is no compelling need* justifying an exercise of the police power burdening private property is sufficient to warrant striking down the legislative act" (A7). Thus, in one fell swoop, the Court below radically changed the standard to be applied, equated "rational relationship" with "compelling need", shifted the burden of proof to the City and committed egregious error with disastrous and far-reaching effects. This Court, as final arbiter of the limitations placed upon the states by the Fourteenth Amendment, has reaffirmed the test of constitutionality vel non to be applied to zoning ordinances in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974):

> We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be " 'reasonable, not arbi-

> trary' " . . . and bears "a rational relationship to a [permissible] state objective." [Citations omitted].

The purpose of the Cap and its related ordinances is to lower density and to guide orderly future growth. These goals have been adjudicated to be rationally related to permissible objectives under the police power of Florida's municipalities,[8] as well as under the Fourteenth Amendment.[9] Indeed, these objectives are not only judicially sanctioned, but are now firmly embedded in Florida's statutory law. Florida Municipal Home Rule Powers Act, §166.021 (A53); Local Government Comprehensive Planning Act, §§163.3167 (1) (a) and 163.3181 (1) (A53); Florida Environmental and Land Management Act, §380.021 (A54).

2. Although decimating the City's residential zoning plan because there was no compelling need for the Cap, the trial court held that the City had the naked power to legally utilize a Cap to control growth (A51). The appellate court affirmed (A2).

If the City is empowered to enact a Cap to lower density and control, guide, and plan future growth, the number of that Cap is exclusively a legislative function unless it falls "very wide of any reasonable mark." *Belle Terre*, *infra* p. 15. The Court below found no fault with a 62,500 dwelling unit limit[10] but found a 40,000 Cap arbitrary

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8. *E.g., Watson v. Mayflower Property, Inc.*, 223 So. 2d 368 (Fla. 4th DCA 1969), cert. discharged, 233 So. 2d 390 (Fla. 1970) in which the same appellate court sub judice stated:

> Zoning involves much more than mere classification. Among other things it involves the *consideration of future growth and development*, adequacy of drainage and storm sewers, public streets, pedestrian walkways, *density of population* any many other factors which were peculiarly within the legislative competence. [Emphasis by the Court].

9. *Belle Terre, supra; Berman v. Parker*, 348 U.S. 26 (1954); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

10. The pre-cap zoning permitted 62,500 dwelling units (A20).

and irrational because there was no "compelling need", (A2) nor "real necessity" (A7) therefor.

Expressing his disapproval and repugnance to the "unsound origin of the Cap", the trial judge recognized that he was not authorized to evaluate the wisdom of the legislation but only to determine whether "it is 'permissible within the relevant and constitutional framework'" (A21). Whereupon, in an exhaustive opinion disagreeing with the people who reside in Boca Raton, the trial court concluded that the City was in great shape (A22, 32) and there was no "real necessity" to enact the Cap (A7, 34). By actually employing a "real necessity" standard, while speaking in terms of the "rational relationship" test, the courts below did exactly what this Court has repeatedly warned against. Asserting Fourteenth Amendment protection, the Florida courts improperly concerned themselves "with the wisdom, *need* or appropriateness of the legislation." *Ferguson v. Skrupa*, 372 U.S. 726 (1963) clearly announced the rule:

> As this Court stated in a unanimous opinion in 1941, "We are not concerned * * * with the wisdom, need, or appropriateness of the legislation". Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to "subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure."[11]

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11. In *City of New Orleans v. Dukes*, 427 U.S. 297, 305 (1976) this Court restated the rule:

> In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, [citations omitted], in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment. [Citations omitted].

Earlier, in the landmark *Euclid*[12] this Court stated:

> We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot—not the courts.

While the trial judge, who did not reside in Boca Raton, found its pre-Cap zoning exemplary, the residents did not. Indeed, dissatisfied as they were with the apathy and unresponsiveness of their elected and appointed officials, the citizens, following this Court's advice in *Euclid* found their way to the ballot box and enacted the Cap.

That legislation whose purpose is to lower density, control and plan for future growth and maintain a well-balanced community bears a rational relationship to public welfare cannot be gainsaid. In *Belle Terre, supra,* relying heavily on *Berman v. Parker, supra,* this Court again refused "to limit the concept of public welfare that may be enhanced by zoning regulations." and repeated:

> ". . . The concept of the public welfare is broad and inclusive. . . . The values that public welfare represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." [416 U.S. 5].

Belle Terre makes the City's point that "compelling need" is an erroneous standard more cogently than any other argument ever could. In short, the courts below determined that a 62,500 dwelling unit limit passes constitutional muster but a 40,000 Cap does not because there was no "compelling need" therefor. Would a 57,500 Cap receive

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12. *Euclid v. Ambler*, 272 U.S. 365 (1926).

judicial approval? 50,000? 45,000? Where is the line to be drawn? As this Court noted in *Belle Terre* [416 U.S. at 8 fn. 5]:

> Mr. Justice Holmes made the point a half century ago. . . . But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark."

The courts below, asserting Fourteenth Amendment aegis, improperly acted as a superlegislature in judging that Boca Raton had no compelling or real need for the challenged legislation. *City of New Orleans v. Dukes, supra* fn. 11.

3. The court below also adjudicated that the lack of a "compelling need" made it unnecessary "to reach the question of confiscation" (A7). Thus, this case also squarely presents the issue of whether the rationality of the 40,000 Cap (as compared to 62,500) can be ascertained without reaching the question of confiscation (or an unreasonable use classification).

If the standard to be applied in testing the rationality of the Cap is not "compelling need" [and it cannot be for then no comprehensive zoning plan could ever be practically accomplished][13] what is the yard stick?

According to Florida and Federal law, the appropriate criterion to determine whether the Cap and its ordinances are unreasonable and therefore unconstitutional is whether the zoning restriction produces arbitrary or capricious results. Is the legislation confiscatory? Does the ordinance destroy all beneficial use or impose an irrational

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13. To be sure, some cities deny any need at all to zone, much less a compelling one, *e.g.*, Houston, Texas. See, Bernard H. Siegan, *Land Use Without Zoning*, D.C. HEATH AND COMPANY (1972).

use classification? In *City of Miami Beach v. Wiesen*, 86 So.2d 442 (Fla. 1956) the Florida Supreme Court referring to the policy of the courts in reviewing zoning ordinances stated: "The Courts should tread lightly in this field and then *only where the actions of the City Council are so unreasonable and unjustified as to amount to confiscation of property.*" That standard still prevails—but has been ignored in this case as to all of the residential property in the City save two parcels.

True, the trial court found confiscation as to Boca Villas and Keating-Meredith (but not Arvida) as an "alternative ground" (A46)—whatever the legal significance of that ruling is. But the City vigorously contended that finding was patently erroneous because the trial court applied improper standards. That issue should have been reviewed.[14]

The appellate court's refusal to reach the confiscation issue in determining the constitutionality vel non of the zoning does violence to this Court's rule that the unreasonableness of legislation is to be measured by its result. *Palmer v. Thompson*, 403 U.S. 217 at 225 (1971); *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 at 677 fn. 10 (1976).

4. The court below then stepped deeper into error by holding that failure to reach confiscation made it unnecessary "to consider the application of various ordinances to specific parcels of property which would possibly bring the fairly debatable rule into play" (A12). Without applying the Cap and its ordinances to the particular pieces of property before the court there was no logical basis for

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14. For purposes of this Petition we are not challenging the propriety, vel non, of the confiscation holding of the trial judge —the City contends the appellate court ran afoul of *Euclid* and *Belle Terre* when it failed to reach the issue because of the improper standards employed by both courts.

judging whether the legislation produces arbitrary or capricious results. *Eastlake, supra.*

Euclid states the rule: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." But whether the validity of the zoning ordinances is fairly debatable cannot be determined in a vacuum. Without considering how a specific ordinance affects a specific property, how can a court determine whether the reasonableness thereof is subject to fair debate? The court below failed to follow the standard established by *Euclid* and reaffirmed in *Belle Terre* in adjudicating that the legislation violated the Fourteenth Amendment.

In sum, the ordinances' reasonable relationship to the police power, the application to specific parcels to determine confiscation and fair debatability are all essential elements inextricably bound together in ascertaining the constitutionality of the zoning legislation - they are not three separate tests as the opinions below obviously considered them. Stated another way:[15]

> The real question is: Does the evidence show that there is a fairly debatable issue as to whether the present zoning is reasonably related to public health, morals safety or welfare?

In the opinion below the court canted the magic words—i.e., rational relationship, fairly debatable,[16] arbitrary—

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15. *City of Jacksonville v. Imler*, 235 So. 2d 526 at 527 (Fla. 1st DCA 1970), *cert. den.*, 239 So. 2d 526 (Fla. 1970).

16. The court stated that even if it had considered the fairly debatable rule, it would have affirmed the trial judge because he "did not assign much weight or credibility to the City's witness." (A12). For purposes of this petition we have assumed arguendo that the trial judge was correct in all matters involving his discretion. All errors complained of are errors of law. *E.g.*, while it is within the trial judge's discretion to disbelieve or discredit experts' opinions, he is not permitted to ignore uncontradicted facts. *Florida East Coast Railway v. Michini*, 139 So. 2d 452, 458 (Fla. 2d DCA 1962).

while it continued to apply the totally erroneous standard of "compelling need".

5. This case also squarely presents the issue of whether, under the guise of the denial of Fourteenth Amendment due process and equal protection, a court may require a City to prove a "compelling need" to enact zoning legislation and thereby erroneously shift the burden of proof to the City.

It is well established that "one who assails the validity of a zoning regulation must carry the burden of proving its invalidity, and the burden is an extraordinary one." *Town of North Redington Beach v. Williams,* 220 So. 2d 22, 23 (Fla. 2d DCA 1969). In balancing a City's right to exercise its zoning police power against Fourteenth Amendment rights, this Court has never placed its imprimatur upon drastic shifts in the burden of proof by the utilization of an improper standard.

This Court's decisions dealing with zoning and other planning devices lead inexorably to the conclusion that the United States Constitution will accommodate a wide range of community planning devices as states and local governments seek new ways to meet the pressing problems of rapid and ravaging growth and change. *E.g.,* from *Euclid, supra* (1926) to *Berman, supra* (1954) to *Belle Terre, supra* (1974) to *City of Eastlake, supra* (1976) to *Vil. of Arlington Hts. v. Metro Housing Dev.,* 429 U.S. 252 (1977). See also Johnson, *Constitutional Law and Community Planning,* 20 L. & CONTEMP. PROB. 199 (1955).

And finally, the sweeping invalidation of Boca Raton's entire residential zoning code was exactly the type of judicial overbreadth that was foreseen and condemned in this Court's first major zoning decision, *Euclid,* 272 U.S. at 395. In upholding the Village of Euclid's zoning code, this Court's closing paragraph is uniquely apposite:

> In the realm of constitutional law, especially, this court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police, with which we are here concerned.

6. The Cap was the result of a referendum. The City is aware that if the substantive result of the referendum is arbitrary and capricious, bearing no relation to the police power, it matters not at all that it represents the wishes of the voters—it will not pass constitutional muster. *Eastlake, supra.* Nevertheless, that the zoning legislation resulted from the vote of the people does not warrant a radical departure from the well established standards to be applied. The tests of rational relationship and compelling need are not synonymous. The frequency with which the courts below employed the language of "rational relationship" in their opinions is immaterial. Careful reading of the judgments leads to the sole conclusion that the actual test applied was "real necessity". Utilization of that test is the epitome of harmful error.

The public policy of Florida, as set forth in its Constitution and statutes, stresses the role of the community's choice, empowers a municipality to determine its own destiny and to preserve its quality of life unless its choice is very wide of any reasonable mark (A53-54). The im-

portance of the broad sweeping eradication of its whole residential zoning code by judicial fiat reaches far beyond the city limits of Boca Raton. The utilization of a "compelling need" standard to test the Fourteenth Amendment validity of a City's zoning legislation runs afoul of *Euclid, Berman* and *Belle Terre,* and creates hopeless chaos in the zoning law as it affects Fourteenth Amendment rights vis-a-vis the police power.

CONCLUSION

The petition for writ of certiorari should be granted.

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APPENDIX

CITY OF BOCA RATON, Appellant,

v.

BOCA VILLAS CORPORATION, a Florida Corporation, and Samuel Fletcher, Trustee, and Keating-Meredith Properties, Inc., Appellees.

No. 76-2322.

District Court of Appeal of Florida,
Fourth District.

April 18, 1979.

Rehearing Denied May 25, 1979.

A city appealed from a judgment of the Circuit Court, Palm Beach County, Thomas E. Sholts, J., finding unconstitutional a charter amendment establishing a maximum number of dwelling units allowable within the city. The District Court of Appeal held that substantial competent evidence supported the trial court's finding.

Affirmed.

Zoning and Planning (Key) 747

Substantial competent evidence supported finding of trial court that city charter amendment establishing maximum number of dwelling units allowable within city was unconstitutional as excessive restriction on use of private property which did not contribute substantially to public health, morals, safety and welfare and was arbitrary and unreasonable.

Gerald F. Richman and Bertha Claire Lee of Frates, Floyd, Pearson, Stewart, Richman & Greer, Miami, for appellant.

No appearance for appellees.

Stephen W. Metz, Tallahassee, for amicus curiae-Florida Home Builders Ass'n.

Duane Searles, Washington, D. C., for amicus curiae-National Ass'n of Home Builders.

Ronald A. Zumbrun, Thomas E. Hookano and Donald M. Pach, Sacramento, Cal., and William L. Earl of Peebles, Earl & Blank, Miami, for amicus curiae-Pacific Legal Foundation.

H. M. Madsen, of Mershon, Sawyer Johnston, Dunwody & Cole, Miami, for intervenor-Arvida.

PER CURIAM.

The City of Boca Raton amended its charter by the initiative and referendum method to establish a maximum number of dwelling units allowable within the city. This zoning device is commonly referred to as placing a "cap" on density, and the parties here refer to this amendment as the "cap". This charter amendment was implemented by ordinances reducing the density in single and multi-family residential zoning classifications.

The charter amendment passed by the city electorate provided:

> "The total number of dwelling units within the existing boundaries of the City is hereby limited to forty thousand (40,000). No building permit shall be issued for the construction of a dwelling unit within the City which would permit the total number of dwelling units within the City to exceed forty thousand (40,000)."

After passage of this charter amendment the City Council approved a City Planning & Zoning Board recommendation for an across-the-board density reduction of 50% for all

multi-family zoning categories. Single family zoning categories were reduced to conform to the average of what had been constructed in the city prior to the charter amendment. Both the charter amendment and the implementing multi-family zoning ordinances were attacked in this suit by two property owners. After some twenty-seven days of trial the court entered an exhaustive final judgment holding that the charter amendment violated due process provisions of the State and Federal Constitutions because the cap did not bear a rational relationship to a permissible municipal objective and that the ordinances in question violated both due process and equal protection of the law. The judgment also held the current zoning of the property in question was confiscatory and directed the properties be rezoned no more restrictive than the judgment designated.

The trial judge held that the City had the power to establish a "cap" or maximum number of dwelling units allowable within the city boundaries. However, he opined that, as with any other zoning restriction, the "cap" must bear a rational relationship to a permissible municipal purpose, i. e., it must promote the public health, morals, safety or welfare. As one would imagine in a case of this nature, numerous experts were called by each side and in many respects they disagreed. It is apparent from the final judgment that the judge was not impressed by the testimony of some of the experts called to support the City's position that the "cap" and implementing ordinances were necessary to effectuate a valid municipal purpose. The judgment points to the testimony of the city Planning Director, city Engineering Director and engineering and planning consultants who contended that the City's present and future planning was quite adequate for a number of years without the cap. For example, Walter Young, the City Director of Planning, described Boca Raton's planning

ly counterproductive to the entire Palm Beach County public school system. Fiscal studies of both parties confirm Boca Raton now generates a surplus of revenue for schools over and above the cost of school expenditures (including cost of new school construction).

"3. Cost-Revenue Studies by both parties establish greater fiscal surplus will result to general and capital funds of the City without the Cap.

"4. Boca Raton's water resources can abundantly withstand anticipated growth so long as proper management policies now in effect are maintained. One of the City's major factual justifications for the Cap was rooted in the 'water crop' theory, which purports to limit population by a budget of rainwater falling within City limits. The theory may be useful *regionally* as a factor in water management decision making. However, its argued use as support for the Cap requires the court completely disregard regional water resources until the city is assured other responsible governmental agencies (U.S. Corps of Engineers. Central and Southern Flood Control District and Lake Worth Drainage District) will continue to protect the municipal interest. Neither the court nor the City can be assured, but there is no creditable evidence these authorities will fail to carry out the responsibilities delegated to them. It is not rational to completely disregard past efforts, future plans and abundant alternative water resources available to Boca Raton through these regional water-management bodies. The record establishes Boca Raton's water resources can and will ultimately be managed regionally. Water re-

sources will not depend upon a 'budget' which Boca Raton or other cities may impose, but rather will depend upon hard social choices involving agricultural priorities, environmental demands, quantity of water used in various sectors, and the cost which society is willing to pay. These are unresolved issues which directly relate to Southeastern Florida water demands and resources. A Cap predicated upon preservation of water resources is a preliminary and unnecessarily drastic solution to an area-water resource issue.

"5. Boca Raton's air quality and noise levels are normal for a community of its size and are well within state and federal standards and regulations. Anticipated growth will not cause those standards and regulations to be exceeded. The Gerrish Study of air pollution and the Peterson Study of background noise lend no credibility to the Cap or the Ashley-Veri report. Other than the water crop theory and these urban environmental studies, the Ashley-Veri report does not completely support the Cap. In fact, the report's final conclusion suggests as much when recommending (a) the Cap be raised and (b) that public funds be devoted to acquisition of vacant lands to reduce units.

"6. The City's current comprehensive plan and zoning maps were essentially prepared prior to and outside the Cap. There is no showing those plans would be jeopardized or materially affected if the Cap were removed.

"7. Much of the defendant's case hinged on expert opinion to the effect the Cap represents an important community goal. The case was largely

> presented in abstract and without specific factual showing of real necessity. Defendant argues unpersuasively that 'necessity is not the test for a city's right to amend its comprehensive plan'. *Burritt v. Harris* [Fla.1965, 172 So.2d 820], supra, *Davis v. Sails* [Fla.App.1975, 318 So.2d 214], supra. The Cap may well be a firm planning goal embodied in legislation. However, legislation as far reaching as this Cap should not be adopted by trial and error. The court is unpersuaded the City's intended review by Ordinance No. 1966 adds present credence to the Cap. If the Cap is now irrational, a legislated promise to later amend, modify or repeal it adds nothing to present validity."

As we mentioned above the trial judge found the charter amendment (the Cap) and the implementing zoning ordinances did not bear a rational relationship to a valid municipal purpose and that the ordinances were confiscatory as applied to appellees' property. Our study of the briefs and record convinces us that there is substantial competent evidence to support the finding of an absence of a rational relationship regarding the charter amendment and zoning ordinance. That being the case, we need not reach the question of confiscation vel non because the finding that there is no compelling need justifying an exercise of the police power burdening private property is sufficient to warrant striking down the legislative act. As the Supreme Court of Florida said in *Burritt v. Harris*, 172 So.2d 820 (Fla.1965),

> "The constitutional right of the owner of property to make legitimate use of his lands may not be curtailed by unreasonable restrictions under the guise of police power. The owner will not be required to

> sacrifice his rights absent *a substantial need for restrictions* in the interest of public health, morals, safety or welfare. If the zoning restriction *exceeds the bounds of necessity* for the public welfare, as, in our opinion, do the restrictions controverted here, they must be stricken as an unconstitutional invasion of property rights." 172 So.2d at 823 (Emphasis added.)

That is not to say there must be an absolute necessity requiring the enactment of certain zoning restrictions before they can be tolerated as a proper exercise of the police power. But, as here, an excessive restriction on the use of private property which does not contribute substantially to the public health, morals, safety and welfare is arbitrary and unreasonable and thus unconstitutional. *Davis v. Sails,* 318 So.2d 214 (Fla. 1st DCA 1975). The trial court found, and the record supports such finding, that the charter amendment and implementing ordinances bore no such rational relationship to the requisite purposes.

We would concede that most of the cases where judicial invalidation of zoning laws has been upheld have in some measure involved the issue of confiscation. Those cases hold that as applied to the property involved the zoning ordinance was unreasonable because it deprived a property owner of the beneficial use of his property. We suggest the reason that the confiscation issue is so pervasive in the case law on this subject is because someone's ox is getting gored. Who is going to intitute litigation but the peron who feels his property rights infringed upon by excessive restrictions upon the use thereof?

There are cases, however, which support the principle that zoning which unnecessarily restricts property, zoning which bears no rational relationship to the public health, safety, morals and welfare is unconstitutional without raising the confiscation issue. In *State v. DuBose,* 99 Fla. 812,

128 So. 4 (1930), the County owned property within the City of Vero Beach and applied for a permit to construct a jail thereon. The permit was denied because the zoning ordinance applicable to this property did not authorize construction of a jail on said property and thus the County sought a Writ of Mandamus. The City contended the reason for prohibiting construction of a jail on said property was that it would increase taxes, increase traffic near a school, and it would diminish the value of school property nearby. Mandamus was denied by the trial court, but on appeal the Supreme Court found there was no support for the City's reasons for denying the County's proposed use of the property. Without a sound rational basis upon which to bottom the refusal, the court found the ordinance to be arbitrary and unreasonable as applied to this property. In a nutshell, there just was not any public need to prevent construction of the jail on the particular property. The court made the point that:

> "The right of an owner to devote his land to any legitimate use is property within the terms of the Constitution, and the Legislature may not under the guise of the police power impose unnecessary or unreasonable restrictions upon such use.
>
> . . .
>
> "This court is committed to the doctrine that courts should not set aside the determination of public officers relative to municipal zoning ordinances, unless it is clear that their action has no foundation in reason and is a mere arbitrary exercise of power without reference to public health, morals, safety, or welfare." 128 So. at 7.

As far as one can tell from the opinion, no claim of confiscation was made. The property owner simply maintained the absence of any reasonable relationship to a per-

missible municipal purpose was sufficient to invalidate the law as it applied to the complainant's property.

In *City of Sherman v. Simms,* 143 Tex. 115, 183 S.W.2d 415 (1944), the City passed a comprehensive zoning ordinance which, among other things, excluded churches from dwelling and apartment districts. That provision was attacked by a church group which wanted to use a structure in a residential district for public worship. Their contention was that prohibiting the use of property in a residential zone for church purpose was arbitrary, discriminatory and violative of the Federal and State Constitutions, because the restriction had no real or tangible relation to the public health, safety, morals or general welfare. After examining various zoning authorities, the court adopted a quotation from another cited case to the effect that:

> " '* * * And we further conclude that the administrative act of respondents in refusing a permit to erect a church in the residential district, there being no adequate showing that this exclusion of the church was in furtherance of the public health, safety, morals or the public welfare, was arbitrary and unreasonable and in violation of relator's rights under the State and Federal Constitutions.' " 183 S.W.2d at 416.

The court went on to state:

> "With this conclusion all the available authorities seem to agree. It must not be overlooked that the power to establish zones is a police power and its exercise cannot be extended beyond the accomplishment of purposes rightly within the scope of that power. To exclude churches from residential districts does not promote the health, the safety, the morals or the general welfare of the community, . . ." Id. at 416-417.

Once again, the thrust of the attack upon the law was the absence of a reasonable relation to a legitimate municipal purpose; that absence being best demonstrated by the lack of any necessity for such restrictive provision.

In view of our conclusion that an otherwise valid attack may be made upon the charter amendment and implementing ordinances, we need not consider the trial judge's findings that the cap and implementing ordinances are so drastic and restrictive as to be confiscatory as applied to appellees' property.

We have not overlooked the rule that municipal legislative action is presumed to be constitutional. But, of course, the presumption is rebuttable and substantial competent evidence was adduced to prove invalidity of the legislative acts. The Supreme Court of Michigan, in *Smith v. Building Inspector For the Township of Plymouth*, 346 Mich. 57, 77 N.W.2d 332 (1956), cited with approval the following:

> "Presumption of the existence of such relationship [the relationship between exercise of police power and the public health, safety, etc.], and hence of the validity of the ordinance is resorted to in the absence of proof on the subject, but not when there are proofs on which a judicial determination thereof may be made as when the contrary is shown by competent evidence or appears on the face of the enactment. *Roman Catholic Archbishop of Detroit v. Village of Orchard Lake,* supra [333 Mich. 389, 53 N.W.2d 308] and cases cited therein." 77 N.W.2d at 335.

The appellant also contends that the fairly debatable rule controls this case, but we disagree. In view of our decision to affirm the trial court's holding that the charter amendment, and implementing ordinances bear no rational relationship to a valid municipal purpose, we do not reach

the issue of confiscation. Thus, we have not found it necessary to consider the application of the various ordinances to specific parcels of property which would possibly bring the fairly debatable rule into play. The fairly debatable rule is a rule of procedure or application which can be simply stated as follows:

> "If the application of a zoning classification to a specific parcel of property is reasonably subject to disagreement, that is, if its application is fairly debatable, then the application of the ordinance by the zoning authority should not be disturbed by the courts. . . . The fairly debatable rule applies to the application of the ordinance and does not modify the requirement that the ordinance itself *and* the application thereof must have a reasonable relationship to the health, safety, morals or general welfare." *Davis v. Sails,* 318 So.2d 214, at 217.

However, if it had become appropriate for us to consider the propriety of the trial court's action in the light of the fairly debatable rule, we would affirm the judgment because, as we mentioned earlier, even though there was expert testimony adduced in support of the City's case, that in and of itself does not mean the issue is fairly debatable.[1] If it did, every zoning case would be fairly debatable and the City would prevail simply by submitting an expert who testified favorably to the City's position. Of course that is not the case. The trial judge still must determine the weight and credibility factors to be attributed to the experts. Here the final judgment shows that the judge did not assign much weight or credibility to the City's witnesses.

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1. *Huttig v. City of Richmond Heights,* 372 S.W.2d 833 (Mo. 1963); *Franz v. Village of Morton Grove,* 28 Ill.2d 246, 190 N.E.2d 790 (1963); *City of Tulsa v. Swanson,* 366 P.2d 629 (Okl.1961); *LaSalle National Bank of Chicago v. County of Cook,* 12 Ill.2d 40, 145 N.E.2d 65 (1957).

In conclusion, we have carefully considered all of the City's contentions which have been well presented; however we fail to find an adequate demonstration of reversible error. In fact, "the able and patient trial judge" (as appellant characterizes him) did a commendable job in resolving the issues presented by this vast record. Accordingly, the final judgment under review is affirmed.

AFFIRMED.

DOWNEY, C.J., ANSTEAD, J., and SILVERTOOTH, LYNN N., Associate Judge, concur.

CITY OF BOCA RATON, Appellant,

v.

ARVIDA CORPORATION, Appellee.

No. 77-533.

District Court of Appeal of Florida,
Fourth District.

April 18, 1979.

Rehearing Denied May 25, 1979.

A city appealed from a judgment of the Circuit Court, Palm Beach County, Thomas E. Sholts, J., finding unconstitutional a city charter amendment providing that no more than 40,000 dwelling units would be allowed in the city. The District Court of Appeal held that an ordinance reducing the allowable number of dwelling units on undeveloped residential property, adopted to implement such charter amendment, was invalid.

Affirmed.

Zoning and Planning (Key) 66

Ordinance reducing allowable number of dwelling units on undeveloped residential property, adopted to implement unconstitutional city charter amendment providing that no more than 40,000 dwelling units would be allowed in city, was invalid.

Gerald F. Richman and Bertha Claire Lee of Frates, Floyd, Pearson, Stewart, Richman & Greer, Miami, for appellant.

H. Michael Madsen of Mershon, Sawyer, Johnston, Dunwody & Cole, Miami, for appellee.

PER CURIAM.

The City of Boca Raton amended its City Charter to provide that no more than 40,000 dwelling units would be allowed in the City.[1] In order to implement this charter amendment the City had to reduce the allowable number of dwelling units on undeveloped residential property. This was accomplished by reducing all multi-family zoning classifications by 50% and by reducing the dwelling units in single family categories to conform to the average of what had been constructed prior to the charter amendment.

Appellee, Arvida, owns a substantial amount of property in Boca Raton in single family zoning classifications

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1. The charter amendment passed by the city electorate provided:

> "The total number of dwelling units within the existing boundaries of the City is hereby limited to forty thousand (40,000). No building permit shall be issued for the construction of a dwelling unit within the City which would permit the total number of dwelling units within the City to exceed forty thousand (40,000)."

This zoning device is commonly referred to as placing a "cap" on density, and the parties here refer to this amendment as the "cap."

and a small amount in multi-family zoning classifications. Being aggrieved by the enactment of the "cap" and implementing ordinances, Arvida brought suit to invalidate the "cap" and ordinances.

The constitutionality of the charter amendment and the multi-family zoning ordinance was decided in the companion case of *Boca Raton v. Boca Villas Corporation,* Fla. App., 371 So.2d 154, Case No. 76-2322, Opinion filed April 18, 1979. The trial in *Boca Villas* took twenty-seven days after which the trial court held that the charter amendment placing a cap on the number of dwelling units allowable in the City and the multi-family zoning ordinances implementing said amendment bore no rational relationship to a valid municipal purpose and that as applied to the property in question there the ordinances were confiscatory, all of which resulted in a declaration of unconstitutionality. This court affirmed that judgment.

All of the evidence, findings of fact and conclusions of law from the *Boca Villas* case were admitted into evidence in this case subject to the stipulation that appellant did not admit that the findings of fact and conclusions were correct. In fact, appellant expressly contended the opposite and proposed to have them reviewed on appeal.

There are several major differences in the two cases: 1) In the *Boca Villas* case the trial court considered and found unconstitutional the cap and implementing ordinances applying to multi-family zoning classifications only; whereas, in this case the Arvida property is primarily located in a single family zoning classification. 2) In the *Boca Villas* case the property owners attempted to demonstrate that as applied to their property the implementing ordinances were confiscatory; whereas, in this case Arvida adduced no evidence vis-a-vis the effect of the legislation

on the use and value of its property; Arvida relied either upon the proof of confiscation in the other case or upon the theory that proof that the cap and ordinances were irrational brought down the implementing ordinances without proof of confiscation. 3) In this case Arvida sought to have Ordinances 1744 and 1745 held valid, although it had attacked them, along with all other implementation ordinances, in its pleadings as being invalid.

In the *Boca Villas* case we affirmed the trial judge's decision, holding the charter amendment and implementing ordinances to be arbitrary, because they bore no substantial relation to a permissible municipal purpose. What we said there is equally applicable here and need not be repeated. Since we found the attack upon the laws sufficient to demonstrate the inadequacy of any rational relationship between them and the public health, safety, morals and welfare, we found it there, as here, unnecessary to plumb the alleged confiscatory aspect of the ordinances as applied to appellee's property.

Suffice to say that our holding in the *Boca Villas* case vis-a-vis the charter amendment and implementing ordinances compels an affirmance here. We have also considered appellee's contentions regarding the validity of Ordinances 1744 and 1745 and find the trial judge's disposition thereof appropriate.

Accordingly, the judgment appealed from is AFFIRMED.

DOWNEY, C. J., and ANSTEAD and BERANEK, JJ., concur.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY

Case No. 73 106 CA (L) 01 F Sholts

BOCA VILLAS CORPORATION, a Florida corporation, and SAMUEL FLETCHER, Trustee,
Plaintiffs,

vs.

E. E. PENCE, Chief Building Inspector of the City of Boca Raton, Florida, et al.,
Defendants.

Case No. 73 540 CA (L) 01 F Sholts

KEATING-MEREDITH PROPERTIES, INC.,
Plaintiff,

vs.

CITY OF BOCA RATON, et al.,
Defendants.

FINAL JUDGMENT

THIS CAUSE came on for trial without jury upon consolidated complaints of two owners of property located within the City of Boca Raton, Florida to obtain certain zoning for their properties based upon attack on the constitutionality of the City's charter amendment §12.09 commonly known as the Cap.

The charter amendment is novel in its approach to density control:

"Section 12.09 Limitation of Number of Dwelling Units

The total number of dwelling units within the existing boundaries of the City is hereby limited to forty thousand (40,000). No building permit shall be issued for the construction of a dwelling unit within the City which would permit the total number of dwelling units within the City to exceed forty thousand (40,000)."

Plaintiffs allege the charter amendment and implementing ordinances are violative of the equal protection and due process clauses of the Constitution of Florida and of the United States, the Fifth and Fourteenth Amendments and the Commerce Clause of the United States Constitution.

Plaintiffs argued:

(a) The Cap and implementation infringed upon the constitutional right to travel.

(b) Prevented the City of Boca Raton from absorbing its "fair share" of housing for the regional area.

(c) The Cap was not "necessary" but was exclusionary in effect and the City therefore had the burden of establishing a "compelling state interest"[1] for enactment.

(d) Plaintiffs also question whether or not constitutional guarantees of procedural due process were thwarted by use of the initiative referendum process. (In Florida there is a direct split of author-

1. The test promulgated by the U.S. Supreme Court where "fundamental" rights guaranteed by the Constitution are infringed such as "right to travel", *Shapiro v. Thompson*, 394 U.S. 618 (1969); "right to vote", *Griffin v. Illinois*, 351 U.S. 12 (1956); "right of association", *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); "access to the courts", *NAACP v. Button*, 371 U.S. 415 (1963) or any "rights of privacy", *Griswold v. Connecticut*, 381 U.S. 479 (1965).

ity: *Andover Development Corporation v. City of New Smyrna Beach,* 328 So.2d 231 (Fla. 1st DCA 1976) Case Nos. W-322 and W-342 supporting Plaintiffs' argument and *City of Coral Gables v. Carmichael,* 256 So.2d 404 (Fla. 3rd DCA 1972) supporting defendant's argument that zoning may be adopted by referendum. Undoubtedly, this conflict will be resolved by the Florida Supreme Court, if not already resolved by the U.S. Supreme Court in *City of Eastlake v. Forest City Enterprises, Inc.,* 96 S.Ct. 2358 (1976). It is not necessary, however, to resolve that issue here because the Cap and implementing ordinances are contrary to constitutional requirements of substantive due process and equal protection in the first place.)

The City argued:

(a) The challenged legislation bore a rational relationship to legitimate state purposes of control of density, maintenance of a balanced community and the validity thereof was "fairly debatable".[2]

(b) The Cap and its implementing ordinances were no more exclusionary than ordinary similar zoning.

* * *

Specifically, the Plaintiff in Case No. 73-106 CA (L) 01, SAMUEL FLETCHER as Trustee for the property hereafter referred to as "BOCA VILLAS", alleges rezoning of its approximately 32 acres from multi-family to single-family (3.1 dwelling units per acre) is irrational and confiscatory; Plaintiff in Case No. 73-540 CA (L) 01, known as "KEATING-MEREDITH", whose property retains its original zon-

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2. *Euclid v. Ambler,* 272 U.S. 365 (1926), and its prolific Florida progeny with exception of *Rural New Town Inc. v. Palm Beach County,* 315 So.2d 478 (Fla. 4th DCA 1975) and *Davis v. Sails,* 318 So.2d 214 (Fla. 1st DCA 1975).

ing category with density reduced from 19 to 9.5 dwelling units per acre makes the same argument.

In reaching the findings of fact and conclusions of law which follow, the court heard extensive testimony, much of which came from local and national experts and reviewed the numerous briefs filed by the parties, including that of the Florida Home Builders Association as amicus curiae.

The Cap resulted from a citizens' initiative and referendum election pursuant to charter. It is agreed the charter amendment is not self-executing, nor does it zone, nor was its original enactment based on scientific studies or professional planning. Its necessary implementation resulted from a long, torturous process while Plaintiffs' properties, along with all other undeveloped property, remained under moratorium.[3]

The court does not quarrel with the wisdom of citizens choosing various methods to control growth. If a reduction in Boca Raton's overall residential densities to 40,000 units would rationally promote public welfare without unnecessary and unreasonable consequences to private property rights, the City could legally utilize a variety of techniques, including a form of Cap. However, consequences of the Boca Raton Cap emphatically distinguish it from existing and allowable densities developed as normally done in most cities. At the outset, the court is deeply concerned about the manner in which the charter amendment's specific limitation of dwelling units was arrived at and enacted. Its passage without benefit of professional or sci-

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3. The City enacted numerous interim moratorium ordinances to maintain the status quo pending studies to determine how the goals set forth in the charter amendment could be implemented. A moratorium advisory board was established which allowed some builders to proceed with construction subject to accepting substantial density reductions.

entific study is crude and repugnant to the court's concept of orderly legislative action. *Steel Hill Development, Inc. v. Town of Sanbornton,* 469 Fed. 2d 956 (1st Cir. 1972). Although expressly disapproving of the Cap's unsound origin, the court is aware of its limited role in determining not the wisdom of the legislation but whether it is "permissible within the relevant and constitutional framework". *Steel Hill,* supra. In short, does the charter amendment with implementing ordinances bear "a rational relationship to a permissible municipal objective"?[4] While the test sounds simple, its application requires consideration of complicated factors and evaluation of weeks of testimony.

The City of Boca Raton consists of 25.46 square miles, is located along the southern portion of Palm Beach County, borders on the Atlantic Ocean and is one of the fastest growing communities in Palm Beach County, Florida. Between 1950 and 1970, its population dramatically increased from 992 to 28,506 persons. It jumped to no less than 43,000 persons by 1974. The City found itself a part of Florida's famed "Gold Coast", faced with the problem of rapid growth which had already ravaged its neighbors to the south.[5] However, Boca Raton differed from most Florida fast-growing cities because of its anticipation and planning for growth impact. Comprehensive planning for the City's future was under way as early as 1957. In 1966 the City's professional staff and advisory officials began revising density ordinances downward in a continuing process. In 1967 the City's consultants, Milo Smith and Associates, prepared a formal written comprehensive plan

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4. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), the first zoning opinion rendered by the U.S. S. Ct. in 48 years or since *Euclid v. Ambler,* supra.

5. This opinion was not only shared by the majority of Boca Raton's citizens but by Plaintiffs' experts as well.

which proved remarkably accurate regarding growth estimates. Between 1957 and 1972, with assistance from outside consultants, the City continuously planned to achieve an orderly low density community. Stringent environmental and aesthetic legislation was adopted to preserve and improve the City. By 1972 the City contained a broad range of land uses including substantial commercial, industrial and educational facilities. Its former "small town" character had disappeared so that Boca Raton was distinguishable only by the high quality of new construction and superb maintenance of private homes and the relatively high income of its middle-age to elderly citizens.

During 1971 two large developers, Behring and Arvida, were planning 2,000 acre developments in the unincorporated western portion of Boca Raton's reserve area that contemplated approximately 25,000[6] dwelling units. Control over westward expansion became a local election issue and all candidates took a firm stand favoring annexation and low density development as the ultimate solution. Predictably and understandably, some Boca Raton residents desired to preserve their "quality of life" from hazards of future growth. These feelings took the form of various efforts at arresting development of the Arvida and Behring projects in the unincorporated area west of town.

Meanwhile, the City Council asked the Florida Legislature's permission to annex the City of University Park, a largely undeveloped area on the western border of Boca Raton, as well as all other unincorporated areas east of the Florida Turnpike within the City's reserve area. Subject to referendum, the Florida Legislature approved annexation of University Park but denied annexation of the unincorporated areas. On July 27, 1971, annexation of Uni-

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6. At that time the City contained a total of 12,343 dwelling units.

versity Park to Boca Raton was approved by the electorate of both cities.

Eighteen days later Arvida Corporation, controller of University Park, applied for zoning in the newly annexed land requesting densities higher than it actually proposed to use. Overheated protest of the citizenry, Arvida's request was granted on February 8, 1972. The next day citizens began preparing and circulating petitions pursuant to Chapter XI of their charter resulting in eventual repeal of the Arvida ordinances a few months later. Legality of the referendum was recently decided by this court in favor of the City on Arvida's claim of estoppel in the case of *Arvida Corporation v. City of Boca Raton*, 74 1431 CA (L) 01 F (Fla. 15th Cir.Ct. 1976).

In March 1972 the City contracted with its land planners, Milo Smith & Associates, to update the City's original comprehensive land use plan originally prepared in 1967 and 1968. On April 11, 1972 an emergency ordinance imposed a 60-day moratorium on zoning for the asserted purpose of studying problems of water, sewage, schools and density.

Such efforts notwithstanding, the citizens involved in the Arvida initiative process believed future growth of the City was not safely entrusted to their elected councilmen and the "ultimate" solution was therefore devised—it was the Cap Charter Amendment—this, although the City's Planning Director, Walter Young, testified Boca Raton's planning for future growth (before Cap adoption) was "second to none" which planning included analysis of present and future population, recreation, open space, roads, sewer and water utilities and water resources. The situation was such that the City's Planning Director, its Engineering Director, its sewer and water engineering consultants, its planning consultants for eight years, and

two successive chairmen of its Planning and Zoning Board testified they were aware of no present or potential inadequacy in Boca Raton's facilities, services, carrying capacity of its land, its resources or environment which required a Cap on housing or population.

On June 27, 1972, the Conservation Committee of the Royal Palm Audubon Society submitted to the City Council a report entitled *The Problems of Growth.* Five major areas were superficially studied without benefit of competent scientific research: water quality and quantity, schools, the social impact and economic effects of population growth and the proposed planned unit development ordinance. The report included a recommendation the City's ultimate population be limited to 105,000 people.

With the Audubon report as background, a proposed ordinance providing for referendum on a charter amendment limiting the total number of dwelling units within the City limits to 40,000 was scheduled for public hearing before the City Council on July 25, 1972. After extensive discussion pro and con, the Cap Amendment referendum ordinance failed to pass for lack of a second.

Utilizing again the initiative and referendum provisions of the City's charter, a small group of citizens caused the Cap to be submitted to the electorate in early August, 1972. Thereafter, a "Citizens for Reasonable Growth Committee" was formed to advocate passage of the Cap amendment. On November 7, 1972, by a vote of 7,722 to 5,626, the electorate amended the City's charter by adding the Cap.

The Audubon committee members drafted their report and Charter Section 12.09 without expert assistance. They utterly failed to coordinate with the City's administration or its outside planning and utility consultants.

It is not therefore surprising that an elemental mistake was made. When the citizens group converted the desired population of 105,000 to dwelling units they selected single-family census statistics of 2.6 persons per dwelling unit totally ignoring the lower multi-family population statistics of 2.05 persons per dwelling unit. When multi-family statistics are properly combined with single-family statistics, the average 1972 population for all dwelling units falls between 2.1 and 2.2 persons. It therefore appears the Cap was set too low from the outset and since the 105,000 population limit was grossly unsupported by reasonable competent expert study, the court concludes the Cap was developed through emotional guesswork. See *State ex rel. Henry v. City of Miami,* 158 So. 82 (Fla. 1934) with concurring opinion by Chief Justice Davis at p. 84 which states:

> "a zoning ordinance enacted simply as a piece of guesswork with no attempt to study the city's problems and no effort to accomplish some general plan adopted to the city's needs in the way of health, safety, prosperity, welfare, and the like, and attended by no surety of the existing situation to which it applies is generally unsustainable as a reasonable or valid regulation."

The first draft of the Milo Smith update (prepared before the Cap) suggested a dwelling unit range of 47,000 to 61,000. After passage of the charter amendment, the second draft of the Milo Smith update revised the low figure to 40,000 because these experts did not find that figure unreasonably low.[7] Frankly, the court simply cannot accept

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7. Milo Smith testified:

"Well, the decision was we felt, yes, it could be practical to go ahead and apply the new updated plan because of the difference between the forty thousand was not substantial enough to make the research work and proposal that we had in the report invalid. It was close enough that it could be adjusted".

as valid this ex-post-facto revision because it seems Milo Smith, under obvious pressures, applied the reverse of that old adage "close only counts in horseshoes". Nevertheless, after reviewing the Planning and Zoning Board's recommended final implementation, Milo Smith found such implementation reasonable and in accord with its updated Comprehensive Land Use Plan but suggested the Cap and its implementing ordinances be subject to periodic review and updating. Accordingly, the City enacted Ordinance 1966 which mandates review of the Cap and resubmission to the electorate every two years.[8]

In March 1973 the City Council submitted to the electorate (while interim moratoria were in effect to allow implementation of the Cap) a proposal to increase the Cap by 15% with 4,000 of the increased dwelling units allocated to Arvida Corporation, apparently for settlement of Arvida's Lawsuit challenging validity of the limitation, which proposition was rejected by the voters.

On July 18, 1973, temporary interim density reductions amounting to 50% on an "across-the-board basis" were enacted for all multiple dwelling units. Between the initial moratoria and the Cap's final implementation in March 1975, the City conducted studies to arrive at some means of implementing the absolute mandate dictated by the Cap. In August 1973 the City contracted with Ashley Economic Services, Inc. of California and Veri & Associates of Florida, for an environmental, fiscal, legal, political, economic and social study of the City. Meanwhile, the City on September 18, 1973, enacted a "third interim moratorium ordinance" which established an additional 10% "across-the-board" temporary density reduction and which expressed the City's intent to provide sufficient

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8. The review ordinance was introduced on April 2, 1974 and enacted on May 4, 1974.

time to evaluate the Milo Smith update and the Ashley-Veri Report before final implementation of the charter amendment. The court has previously referred to the Milo Smith update and the firm's recommendation pertaining to the periodic review and update of the Cap. The Ashley-Veri Report is later mentioned on page 16 of this judgment.

On March 26, 1974, the City Council approved the Planning and Zoning Board recommendation to finally implement the Cap by: (a) permanently enacting a 50% "across-the-board" density reduction, (b) repealing the last 10% density cut applicable to all residential categories, and (c) providing for termination of the moratorium.

Unfortunately, when the Cap was adopted, it became the function of the City Administration to implement the absolute mandate dictated by its citizens, and therefore the Cap cannot be considered in a vacuum but must be judged together with its final implementing ordinances since those ordinances affect plaintiffs' property rights. Because there had been no study or competent effort to determine "how and with what effect" the Cap would be implemented once passed, its passage imposed an almost impossible burden on the City's zoning officials. Confusion was rampant and extra-ordinary techniques were used to reduce overall density to 40,000 dwelling units. The City *was compelled* (emphasis supplied) to adopt arbitrary and discriminatory multi-family zoning densities to carry out the Cap choice of its citizens. If "across-the-board" 50% density reduction in multi-family zoning classifications imposed under Cap implementation bear any reasonable relationship to characteristics of the properties or areas involved, it is by pure accident. Interestingly, despite extreme effort, the City's zoning presently permits approximately 44,000 dwelling units, or 4,000 units short of full implementation. An additional 4,000 unit cut of vacant

multi or single-family property appears impossible and since Boca Raton is a growing city, replacement of existing housing stock at current low density will not occur in sufficient numbers to solve the problem.

At trial, 35 witnesses testified, mostly experts for both sides, including three appraisers, eleven city planners and four experts on water supply and quality. The vast majority of testimony related to questions of whether the Cap and implementing ordinances were discriminatory, exclusionary in purpose or effect, confiscatory or arbitrary, and whether there was any rational basis for the Cap.

The court believes the manner of Cap selection does not necessarily invalidate it. If a fixed limit on housing substantially and rationally promotes public welfare, it may well pass constitutional muster. Regrettably, in Boca Raton, such is simply not the case. The evidence concerning the Cap's emotional and arbitrary birth, its unreasonable effects and the lack of a material, factual and substantial relationship to public welfare is so compelling that fair debate should not really be expected. Although the Cap may represent the desires of a majority of the City's voting population, that choice must not and cannot override a constitutional imperative—the electorate may only act to promote substantial public welfare without exceeding the bounds of necessity. *Lawton v. Steele,* 152 U.S. 133 (1894); *Goldblatt v. Town of Hempstead,* 368 U.S. 892 (1962); *Dean Milk Co. v. Madison,* 340 U.S. 349 (1951); *Burritt v. Harris,* 172 So.2d 820 (Fla. 1965); *Corneal v. State Plant Bd.,* 95 So.2d 1 (Fla. 1957); *William Murray Builders Inc. v. City of Jacksonville,* 254 So.2d 364 (Fla. 1st DCA 1971); *Davis v. Sails,* supra. Nonetheless, the court in deciding this case hereby will apply the fairly, debatable rule to the issues. The court concludes and finds that the 40,000 dwelling unit Cap and its multi-family implementa-

tion are irrational. Three examples of the irrational consequences caused by the Cap stand out:

A. The court has previously referred to the fact that despite extreme effort the City's post-cap zoning presently allows approximately 44,000 dwelling units or 4,000 units short of full implementation. In fact, multi-family classifications are the only type housing where replacement will result in any appreciable reduction in overall density and the evidence suggests this type housing density may be depleted as early as 1985. As a direct result, the Cap imposed upon Boca Raton taxpayers a burden of making massive public expenditure to acquire vacant property.[9] Only minimal sums had previously been budgeted for public land acquisition. Thus it seems contrary to public welfare to require present taxpayers to purchase unidentified vacant land at some future time for unspecified amounts of money to fill such needs.

B. The second irrational consequence of Cap implementation arises from inadequate consideration of the type growth sought to be limited. The Cap applies only to "dwelling units" and was so implemented. It does not apply to hotel and motel units (of which there are 382,000 allowable) or to commercial or industrial properties. The record indicates there may be a surplus of these properties within the City. Any needed change in land use classification from hotel and motel, commercial or industrial, is

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9. In a review of all multi-family classifications, the lowest land cost per unit in the city was approximately $5,000.00. This would suggest a minimum expenditure of $20,000,000.00 if public acquisitions are required to implement the Cap. A rezoning of substantial vacant properties to commercial, hotel or motel and industrial uses is not the answer. The City's reports and evidence in the record establish the City already contains a surplus of said properties and that such a drastic shift from the residential to commercial sector would materially and detrimentally alter the residential character of the City. If owners of vacant residentially zoned property were completely denied any residential building permits a confiscation would undoubtedly occur.

severely inhibited because rezoning to residential use would add to the overall 44,000 units presently allowed.

C. A third irrational (and arbitrary and discriminatory) consequence of Cap implementation is the unfair treatment given owners of vacant multi-family property. As part of implementation the City set single-family densities by comparing "as built construction" in existing subdivisions. A similar "as built" study was conducted in multi-family classifications which, for example, showed the R-3 classification as developed from 23 to 29 units per acre, depending on location. Without consideration of effect, multi-family classifications were slashed 50% after previously having been reduced by approximately 30% in October, 1972, one month before Cap adoption. In its zeal to accomplish the absolute mandate called for by the Cap, the City made no good faith attempt to determine whether multi-family implementation densities were reasonable.

Imposition of a Cap without adequate consideration of present and future consequences is evidence, but not sufficient proof alone, of irrationality. Therefore, the court carefully considered the purposes allegedly served by the Cap. In Florida, zoning legislation may be intended to preserve and protect:

(a) Patterns and density of development.

(b) Adequacy of municipal utilities and services.

(c) The character of subject properties and surrounding areas.

(d) The potential for beneficial use of subject properties. *City of Miami Beach v. Waiss,* 217 So. 2d 836 (Fla. 1969); *Watson v. Mayflower Properties, Inc.,* 233 So. 2d 390 (Fla. 1970).

When legislative judgment is determined rationally related to these and other legitimate interests, the court should not substitute its judgment for that of zoning officials. But here, the court believes there is no real substantial relationship between the Cap and the public purpose allegedly protected and preserved by it. The evidence presented by the City simply failed to establish a sufficient substantial benefit to the public welfare of Boca Raton. *City of Miami v. Weiss*, supra; *City of Miami v. Rosen*, 10 So. 2d 307 (Fla. 1942); *City of Miami Beach v. 8701 Collins Ave.*, 77 So. 2d 428 (Fla. 1954). Certainly, a Cap chosen by the people creates a planning objective which is definite and firm as to the future. As deduced from opinions of the City's experts,[10] such planning objective is the principal rationale in support of capping. However, where a city such as Boca Raton is demonstrated to have been able to adequately cope with anticipated growth, the court does not consider the certainty of future planning to be a sufficiently substantial benefit as to completely override private property rights. Further, to the extent the Cap represents a decision of the City's citizens to lower density and control growth, the Cap's consequences are obviously unnecessarily excessive.

All the study which normally goes into adoption of zoning legislation and which surely must go into adoption of

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10. The City elicited from various planning experts that it could legitimately counteract housing trends by efforts aimed at achieving a "balance" in housing type (against multi-family) and age of population (against elderly). This court finds that the Cap does not distinguish between types of dwelling units or age of population to be housed and as such the Cap is unrelated to any such social "balancing" goals, even if legitimate. Besides, there is no competent evidence that the Cap would or was intended to serve such purposes. The court further notes that none of the City's land planning experts have previously recommended a fixed cap concept for growth limitation to other clients.

city-wide growth control limits[11] was conducted *after* Cap adoption. These studies were considered by the court since they may nevertheless be valid even though not conducted in a normal or advisable manner. The court's findings regarding after-the-fact studies of the Cap's relationship to public welfare are as follows:

1. Boca Raton's utility systems and services are presently adequate, were adequate prior to the Cap, and there are no present indications of undue strain as a result of further anticipated growth within densities allowed prior to the Cap.

2. Boca Raton's school facilities are presently overcrowded but the adequacy or inadequacy of those facilities is beyond jurisdictional control of the City and therefore unrelated to purported limited growth benefits of a Cap. The court has already spoken to this issue in holding unconstitutional a Boca Raton ordinance requiring developers of unplatted subdivisions to obtain a letter of intent covering new school construction from the Palm Beach County, Florida School Board. *Talmon v. City of Boca Raton,* No. 75 4286 CA (L) 01 F (Fla. 15th Cir. Ct. 1976). Further because of Boca Raton's population distribution, the Cap is most likely counterproductive to the entire Palm Beach County public school system. Fiscal studies of both parties confirm Boca Raton now generates a surplus of revenue for schools over and above the cost of school expenditures (including cost of new school construction).

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11. E.g. *Construction Industry Association of Sonoma County v. City of Petaluma,* 522 F. 2d 897 (9th Cir. 1975), cert. den. 96 S. Ct. 1148 (1976).

3. Cost-Revenue Studies by both parties establish greater fiscal surplus will result to general and capital funds of the City without the Cap.

4. Boca Raton's water resources can abundantly withstand anticipated growth so long as proper management policies now in effect are maintained. One of the City's major factual justifications for the Cap was rooted in the "water crop" theory, which purports to limit population by a budget of rainwater falling within City limits. The theory may be useful *regionally* as a factor in water management decision making. However, its argued use as support for the Cap requires the court completely disregard regional water resources until the City is assured other responsible governmental agencies (U.S. Corps of Engineers, Central and Southern Flood Control District and Lake Worth Drainage District) will continue to protect the municipal interest. Neither the court nor the City can be so assured, but there is no creditable evidence these authorities will fail to carry out the responsibilities delegated to them. It is not rational to completely disregard past efforts, future plans and abundant alternative water resources available to Boca Raton through these regional water-management bodies. The record establishes Boca Raton's water resources can and will ultimately be managed regionally. Water resources will not depend upon a "budget" which Boca Raton or other cities may impose, but rather will depend upon hard social choices involving agricultural priorities, environmental demands, quantity of water used in various sectors, and the cost which society is willing to pay. These are unresolved issues which directly relate to Southeastern Florida water demands and resources. A Cap

predicated upon preservation of water resources is a preliminary and unnecessarily drastic solution to an area-water resource issue.

5. Boca Raton's air quality and noise levels are normal for a community of its size and are well within state and federal standards and regulations. Anticipated growth will not cause those standards and regulations to be exceeded. The Gerrish Study of air pollution and the Peterson Study of background noise lend no credibility to the Cap or the Ashley-Veri report. Other than the water crop theory and these urban environmental studies, the Ashley-Veri report does not completely support the Cap. In fact, the report's final conclusion suggests as much when recommending (a) the Cap be raised and (b) that public funds be devoted to acquisition of vacant lands to reduce units.

6. The City's current comprehensive plan and zoning maps were essentially prepared prior to and outside the Cap. There is no showing those plans would be jeopardized or materially affected if the Cap were removed.

7. Much of defendant's case hinged on expert opinion to the effect the Cap represents an important community goal. The case was largely presented in abstract and without specific factual showing of real necessity. Defendant argues unpersuasively that "necessity is not the test for a city's right to amend its comprehensive plan". *Burritt v. Harris,* supra, *Davis v. Sails,* supra. The Cap may well be a firm planning goal embodied in legislation. However, legislation as far reaching as this Cap should not be adopted by trial and error. The court is unpersuaded the City's intended review by Ordi-

nance No. 1966 adds present credence to the Cap. If the Cap is now irrational, a legislated promise to later amend, modify or repeal it adds nothing to present validity.

After reviewing the consequences the Cap imposes upon the City's future and the relationship it bears to legitimate governmental purpose, the court considered its present and potential detrimental effect on private property rights. Plaintiffs offered appraisal testimony in an attempt to estimate minimum loss ($50,000,000.00) of property value imposed after implementation. Of itself, a loss of property value city-wide, (even $50,000,000.00) is not sufficient to invalidate the Cap. *City of Miami Beach v. Wiesen,* supra; *City of Miami v. Zorovich,* 195 So. 2d 31 (Fla. 3rd DCA 1967); *Trachsel v. Tamarac,* 311 So. 2d 137 (Fla. 4th DCA 1975). However, validity of the Cap city-wide must be assessed in economic terms by balancing public benefit gained against the degree to which individual property rights are affected. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922) and *Nectow v. City of Cambridge,* 277 U.S. 133 (1928); *Averne Bay Construction Co. v. Thatcher,* 15 N.E. 2d 587 (N.Y. App. 1938). In its best light, the Cap's real public benefit is to clearly and concretely focus the community's choice upon low density. At worst, such community choice is seen as an attempt to eliminate individual zoning density decisions from the normal legal process. Whether or not the loss in property value was $50,000,000.00 or less, it is certainly enough, coupled with the implementation fiasco, to outweigh any minimal benefit.[12]

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12. It is noted that neither the citizens who promoted the Cap nor the City which implemented it gave any consideration to the effect their actions would have on individual property owners although with some reasonable effort this could have been done.

Additionally, the Cap and its implementing zoning raise an even more serious question of public welfare—development of an exclusionary zoning pattern. When one is confronted with Boca Raton's Cap, the impression is unmistakable, the legislation is of the "I'm aboard, Jack. Pull-up-the-ladder" variety. As the City points out, the Cap is not necessarily an exclusionary measure adopted for selfish purposes or worse, and the court has not inquired into motives, but its effect on housing supply has been to eliminate possibility of private construction of low and moderate income housing. For example, some 26.9% of Boca Raton's current population maintain a family income of $10,000.00 or less. After the Cap, the City's reports establish no new housing will be constructed in Boca Raton for low income families and virtually none for those of moderate income:

Single Family	Number of Units	
	1968-70	1971-90
$20,000-$30,000	67	0

Multi Family (Condo)	Number of Units		
	1968-70	1971-80	1981-90
to $20,000	139	80	0
$20,000-$30,000	235	390	70

Rental Units	Number of Units		
	1971-75	1975-80	1980-90
to $150/mo.	150	—	—
$150-$200/mo.	420	310	370

Plaintiff's appraiser testified the Cap as implemented had the effect of raising the cost of single family and multi-family housing and as a result the minimum cost of con-

structing new single family homes, with few exceptions, rose to $50,000 and for multi-family to $40,000 although below that price, only approximately 200 single family homes could be constructed within a range of $32,000 to $37,000.

Recently, some state courts have required growing communities must provide a fair share of regional housing demands. See *Southern Burlington NAACP v. Township of Mount Laurel,* 336 A. 2d 713 (N.J. 1975); *In re: Appeal of Girsh,* 263 A. 2d 395 (Pa. 1970); *In re: Appeal of Kit Mar Builders, Inc.,* 268 A. 2d 765 (Pa. 1970); *Berenson v. Town of New Castle,* 38 N.Y.2d 102 (378 N.Y.S. 2d 672 1975). This court does not find it necessary to hold Boca Raton failed to meet low and moderate housing obligations inasmuch as the Cap violates constitutional due process requirements of a "rational relationship" to a "permissible state objective" as required in *Euclid v. Ambler* and *Village of Belle Terre,* supra. The court does believe that when a developing and varied community such as Boca Raton makes a land use decision of substantial city-wide magnitude, some consideration must be given possible effects of unnecessarily shifting unwanted housing responsibilities to neighboring communities. Such consideration should be included in the assessment of the rationality of the legislation. Viewed in this manner, the Cap imposes an unnecessary low and moderate income housing burden on neighboring communities and Boca Raton's neighbors are presently unable to fulfill this demand. See Palm Beach County Housing Studies, June 1973, Plaintiffs' Exhibit 92 and April 1972, Plaintiffs' Exhibit 93.

Turning to the subject property, the court finds the Cap implementing ordinances prevent Plaintiffs from beneficially utilizing their property under present allowable uses. Confiscation has accordingly resulted to both plaintiffs.

Plaintiff, SAMUEL FLETCHER, Trustee, is now permitted R-1-D, 3.1 d/u/acre, with a present market value ranging from $238,080 to $400,000 depending upon the appraiser. Faced with a large inventory of unsold single family lots lying immediately to the north, Mr. Fletcher's zoning and density prohibit beneficial development within the foreseeable future.[13]

The property of Plaintiff KEATING-MEREDITH PROPERTIES, INC. is located within an established multi-family rental neighborhood developed at a much higher density than 9.5 du/acre now allowed after implementation. Keating-Meredith invested $238,000 in property acquisition. Mr. Howard Keating testified it was not feasible to develop or secure financing for development at implementation density. Plaintiff's evidence shows the Keating-Meredith property could not be beneficially developed or sold for any permitted use within the foreseeable future.

Plaintiff's confiscation testimony was largely unrefuted. The City's appraisers made no development study of plaintiffs' properties. Further, the City's appraisers were unable to testify when either Plaintiff might foreseeably expect a return of their out-of-pocket investment in the properties.

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13. The City argues Fletcher's property was rezoned independent of the Cap. The record of the City Planning and Zoning Board Minutes (Plaintiffs' Exhibit 13) reveal the Cap had significant impetus on the decision to change this zoning classification. It is impossible to determine if that zoning decision could have been independently developed. Board Chairman Rogers' privately held planning maps are not persuasive and certainly cannot now be used as evidence of the City's intent to change zoning. Plaintiff was developing plans and providing utilities and roadway dedications to the City after Chairman Rogers' maps were prepared. In any event this Plaintiff is not required to prove the change to single family zoning was part of Cap implementation since Mr. Fletcher has established the existing zoning applied to his property is confiscatory and the density of 3.1 du/acre was arrived at in the Cap implementation process.

Lastly, this court has heretofore expressed concern about the after-the-fact justification for the Cap and the manner in which it originated. The court is aware of the attitude of distrust that many citizens of Boca Raton harbor against their elected officials. In this regard, the citizens of Boca Raton must understand:

(a) The initiative referendum process although itself valid cannot be used as a means of circumventing the law.

(b) Actions taken pursuant to the initiative referendum process are subject to the same judicial scrutiny as are the acts of the City Council.

* * *

Based on the foregoing, it is

ORDERED AND ADJUDGED:

1. Section 1209 of the Charter of the City of Boca Raton *"Limitation of Number of Dwelling Units"* violates Florida and Federal constitutional guarantees of due process and is void and of no further force and effect.

2. The multi-family zoning densities imposed under Boca Raton Ordinance No. 1952 and its predecessors beginning with Ordinance No. 1733 and successors have no other reason for existence other than to implement Charter Section 12.09. Such ordinances violate constitutional guarantees of due process and equal protection and are void and of no further force and effect. Zoning densities in effect prior to November 7, 1972 are accordingly in force and effect, provided, nothing herein shall prohibit the City from adopting other zoning laws and related measures so long as they substantially and rationally promote the public health, safety and welfare without unnecessary abridgement of private property rights.

3. The current zoning density of 3.1 du/acre imposed upon the property of plaintiff, SAMUEL FLETCHER, TRUSTEE, under Boca Raton Ordinance 1963 and successors is confiscatory, void and of no further force and effect and the City is directed to rezone said property to a classification and use no more restrictive than Boca Raton, R-3, 13 du/acre—any lesser density being deemed confiscatory.

4. The current zoning density of 9.5 du/acre imposed upon the property of plaintiff, KEATING-MEREDITH PROPERTIES, INC., under Boca Raton Ordinance 1952 and successors is confiscatory, void and of no further force and effect and the City is directed to rezone said property to a classification and use no more restrictive than Boca Raton, R-3, 13 du/acre—any lesser density being deemed confiscatory.

5. The court retains jurisdiction to carry out the terms of this judgment. Costs, if any, shall be awarded after motion upon notice.

DONE AND ORDERED at West Palm Beach, Florida, this 30th day of September, 1976.

/s/ Thomas E. Sholts
Thomas E. Sholts, Circuit Judge

Copy furnished:

Tylander de Claire Becker & Van Kleeck
Frates Floyd Pearson Stewart Proenza & Richman

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY.

CASE NO. 74 1431 CA (L) 01 F (Sholts)

ARVIDA CORPORATION, a
Delaware corporation,
Plaintiff,

vs.

CITY OF BOCA RATON, a Florida
municipal corporation,
Defendant.

FINAL JUDGMENT AS TO COUNT I

This cause was tried before the court November 19, 1976, upon Count I of a complaint filed by Plaintiff, Arvida Corporation. Plaintiff seeks to invalidate the 40,000-dwelling-unit "cap" enacted November 8, 1972, by Defendant, City of Boca Raton, together with certain density-reduction ordinances enacted to "implement" the cap, upon grounds these legislative enactments are beyond the constitutional power of municipal goverment under Florida law.

The action reaches this court after having been filed initially as an attack upon the constitutionality of the cap in the United States District Court for the Southern District of Florida, Case No. 72-2006-Cw-Cf. By order dated April 3, 1974, the United States District Court abstained from further proceedings pending resolution of all state court issues. Thereafter Arvida filed its complaint in two counts. Count I alleges lack of municipal power and specifically 1) reserves federal constitutional issues for determination by the federal court and 2) limits the cause

before this court to municipal power under Section 2 of Article VIII of the Florida Constitution. Arvida's complaint asserts invalidity of the cap and Ordinances 1744, 1745, 1821, 1828, 1951 and 1952. Count II involving equitable estoppel was resolved in favor of the city by this court's "Final Judgment on Count II" entered August 18, 1976. No question of confiscation is before the court.

On September 5, 1974, this court denied Arvida's motion to intervene and consolidate this case with the previously consolidated cases of Boca Villas Corporation v. City of Boca Raton, Case No. 73 106 CA (L) 01 and Keating-Meredith Properties, Inc. v. City of Boca Raton, Case No. 73 450 CA (L) 01 (hereinafter Boca Villas).

The cap, Section 12.09 of the Boca Raton Charter, provides:

> "Section 12.09 Limitation of Number of Dwelling Units
>
> "The total number of dwelling units within the existing boundaries of the City is hereby limited to forty thousand (40,000). No building permit shall be issued for the construction of a dwelling unit within the City which would permit the total number of dwelling units within the City to exceed forty thousand (40,000)."

When this provision took effect, the zoning legislation in Boca Raton allowed approximately 62,500 dwelling units, assuming all undeveloped residential property was built to theoretical maximum density. It thus became apparent the only realistic alternative available to implement the Cap was to reduce allowable densities on undeveloped residential property. The reduction was accomplished by the city, commencing in July, 1973 (after a series of building and zoning moratorium ordinances), by adoption of "interim" Ordinances 1821, 1822 and 1828. The interim density reductions were made permanent in 1974, with enactment of Ordinances 1951 and 1952.

Earlier in the progress of this case, Arvida moved for summary judgment, contending a dwelling-unit "cap" of any size was beyond the scope of municipal power. The court denied Arvida's motion on the ground issues of fact remained for trial. This order was affirmed on appeal. Arvida Corp. v. City of Boca Raton, 312 So. 2d 826 (Fla. 4th D.C.A. 1975).

By pretrial stipulation dated November 9, 1976, the parties adopted by reference the record in the two consolidated cases previously tried before this court which also involved validity of Boca Raton's cap (Boca Villas, supra). The adoption included Findings of Fact and Conclusions of Law dated September 30, 1976, together with the entire transcript of proceedings, including all memoranda, testimony, exhibits, evidence, and argument of counsel. The city reserved the right to contest the findings and conclusions by appropriate appellate procedures in the Boca Villas cases, and both parties reserved all objections to relevancy and materiality of this evidence. Subject to the city's appellate rights in the former cases, the court will decide this case upon the evidence previously adduced and findings of fact previously reached, together with additional evidence adduced by Plaintiff during trial of this cause on November 19, 1976.

Arvida contends the Boca Villas judgment invalidating the cap and all subsequent multi-family zoning ordinances necessarily operates to ipso facto invalidate all subsequent single-family zoning ordinances. Arvida seeks an adjudication that Ordinances 1828 and 1951 reducing density on R1A and R1D categories from 3.6 d.u.p.a. to 1.53 d.u.p.a. and from 5.28 d.u.pa. to 3.1 d.u.p.a. respectively, are void with respect to its single-family zoned properties. Arvida, however, now contends Ordinances 1744 and 1745 (enacted on November 14, 1972 changing Parcel A from R1A to R1D) are valid because that legislation is not cap-related.

The city contends Arvida is estopped to assert validity of Ordinances 1744 and 1745 since Arvida's complaint seeks to invalidate those ordinances, and if Arvida's contention is valid as to effect of the Boca Villas judgment on single-family zoned land, then Parcel A reverts to R1A zoning at a pre-cap density of 3.1 d.u.p.a. In the alternative, the city contends if Ordinances 1744 and 1745 are valid because they are not cap-related, then the only evidence before the court is that the 3.1 d.u.p.a. is reasonable.

The court finds Arvida owns undeveloped, residentially-zoned real property within the corporate limits of Boca Raton in the following approximate acreages, subject to the following zoning classifications and residential densities before and after "implementation" of the cap:

		Permissible Units Per Acre	
Acreage	Classification	Before Implementation	After Implementation
212	R1A	3.63	1.53
2000	R1D	5.28	3.1
8	R3	19.0	9.5
15	R4	30.0	15.0
45	R5	35.0	17.5
47	R5A	40.0	20.0

Among other findings, this court found in Boca Villas:

1. The cap was passed without benefit of professional or scientific study, and the 40,000-unit figure was chosen without coordination with any city official. (Final Judgment at 4, 8.)

2. Boca Raton's "small town character" had disappeared by 1972, and the city contained a broad range of land uses, including substantial commercial, industrial, and educational facilities (Id. at 5.)

3. The city, as a result of the cap, was compelled to enact across-the-board 50% density reductions in all multi-family zoning classifications. These reductions have no reason for being other than implementation of the cap. (Id. at 11, 21.)

4. The exclusionary effect of the cap imposes an unnecessary low and moderate income housing burden on neighboring communities, and Boca Raton's neighbors are presently unable to meet his demand. (Id. at 19.)

5. Even considering the city's after-the-fact studies, the cap does not bear a rational relationship to a legitimate state or municipal objective; the invalidity of the cap is not fairly debatable.

Although this court in Boca Villas was not presented with an issue as to validity of Ordinance 1951 (the implementing ordinance reducing densities in single-family zones), the single-family ordinance, like the multi-family ordinance (1952), expressly states its purpose is to implement the cap. Under Ordinance 1951, Arvida's single-family property zoned R1D suffered a 41% reduction in allowable density (from 5.28 to 3.1 units per acre); its property zoned R1A was reduced by 57% (3.63 to 1.53 units per acre).

The court is inclined toward the view, expressed in the Boca Villas Judgment, that a dwelling unit cap of some size might be a proper exercise of municipal power, if the number of dwelling units chosen would rationally promote public welfare without unnecessary and unreasonable consequences to private property rights. Quite the contrary in Boca Raton's case, the specific limitation of city size to 40,000 dwelling units does not bear a rational relationship to any permissible municipal objective.

The city contends invalidity of the cap does not necessarily entitle Arvida to any relief, since the implementing ordinances have not been shown confiscatory as to any specific parcel.[1] Although the implementing ordinances were found confiscatory as to specific properties involved in Boca Villas, the confiscation in those cases was an alternative ground for the court's Judgment. It was the court's finding then, and now, the cap and its implementing ordinances are inexorably intertwined as elements of the same overall legislative scheme to limit overall size of Boca Raton to 40,000 dwelling units.

As to Arvida's multi-family properties, the court's Judgment in Boca Villas expressly invalidated the multi-family density reduction ordinances, including the present Ordinance 1952 and its predecessors. The city contends this result should not apply to Arvida's multi-family properties, because Boca Villas was not a class action and Arvida was denied leave to intervene. The court disagrees inasmuch as the parties stipulated to adopting by reference the evidence, findings of fact and conclusions of law in the Boca Villas cases which leads the court to the conclusion multi-family implementing ordinances are invalid as to Arvida's properties.

The final judgment in Boca Villas did not expressly invalidate Ordinance 1951 (the single-family implementation ordinance) because neither plaintiffs owned property zoned for single family use at the time the cap was implemented. However, the court finds the single-family implementing ordinance is equally dependent upon the cap for validity. Ordinance 1951 (single family) and Ordinance 1952 (multi-family) contain identical legislative preambles stating, "this ordinance is considered a necessary

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1. The issue of confiscation has been expressly reserved by Arvida for later decision by the United States District Court, pursuant to an order of abstention issued by that court.

tool towards implementing the 40,000 CAP." Both were enacted after a long, tortuous "implementation" process which left Boca Raton city officials no alternative but to substantially slash permissible densities in all residential zoning classifications. Under Ordinance 1951, Arvida's R1D property has been reduced in density by 41%, and its R1A property by 57%, for the express purpose of achieving an irrational city-wide target of 40,000 dwelling units. The legislative purpose advanced in defense of this reduction—to achieve "as-built" densities in single-family zones—is not mentioned in the ordinance. Thus, the demise of the cap is fatal to Ordinance 1951.

This court found in Boca Villas, "the Cap cannot be considered in a vacuum but must be judged together with its final implementing ordinances." (Final Judgment at p. 10). Municipal legislation is subject to the same rules of construction applied to acts of the Legislature. Rose v. Town of Hillsboro Beach, 216 So. 2d 238 (Fla. App. 4th 1968). Even if it is assumed single family density reductions might otherwise be valid as applied, their sole stated purpose is implementation of a void legislative enactment - the Cap. Considering the Cap and its implementing ordinances as a single legislative scheme leads to applicability of the following principles of construction:

"99. Invalidity of Inducement of Legislation.

"Where the void parts of a statute are evidently designated as an inducement to the valid portions thereof, so that the whole taken together justifies the conclusion that the Legislature would not have passed the valid portions alone, the entire statute is inoperative."

6 Fla. Jur. Constitutional Law §99 (1956); see, e.g., Dade County v. Keyes, 141 So.2d 819 (Fla. 3d D.C.A. 1962).

"430. Invalidity of Dependent Ordinances

"Where from reference to a prior ordinance or statute for treatment of the same subject matter an ordinance becomes dependent on its predecessor for its operation and effect, the ordinance, although possessing no inherent defects in itself, loses validity because of some fatal defect in the previous enactment."

62 C.J.S. Municipal Corporations §430.

The city contends the present single-family densities are fairly debatable as applied to any particular property, and should not, therefore, fall with the cap. This court rejected the same argument in Boca Villas with regard to multi-family implementation, finding "across-the-board" 50% density reductions in multi-family zoning classifications imposed under cap implementation would bear a reasonable relationship to characteristics of the particular properties or areas involved only by pure accident. Obviously, the same is true about the 41% density reduction in R1D zones and the 57% reduction in R1A zones. The record lacks evidence of any consideration by the city as to the effect of these across-the-board reductions upon any particular affected property.

In the case commonly cited for invalidity of contract zoning, Hartnett v. Austin, 93 So.2d 86 (Fla. 1956), the court invalidated a rezoning ordinance enacted so as to become effective only upon fulfillment of certain conditions by the landowner. The city contended the ordinance was nevertheless fairly debatable as applied. The court stated:

"When a zoning ordinance is amended by changing the classification of particular property, such amendment must be justified by a change in the use value of the property involved.

We are not here receding in any fashion from our established rule that if the need for a change in a zoning ordinance is 'fairly debatable' the decision of the governing authority will be given the benefit of the doubt. Here the ordinance expressly recognized that the change was justifiable only: (1) if the Bay Point Wall was built; (2) if there was a 40 foot set-back; (3) if the set-back area was landscaped and maintained; (4) if surrounding property owners were protected against glare and disturbance; and (5) if the property owner paid for police protection. All of these 'ifs' were to be included in a proposed collateral private contract to be executed in the future. If the City Commission, after appropriate hearing, had determined that the highest and best use value of the land had changed from residential to commercial, then the 'fairly debatable' rule might have a sphere of applicability. This was not done."

In its complaint Arvida seeks to invalidate Ordinances 1744 and 1745 which changed Arvida's University Park land from R1A to R1D:

Paragraph 34, p. 10 of the complaint alleges:

Arvida has no remedy at law adequate to compensate it for the injuries already suffered and the injuries it in the future will suffer as a direct result of Charter Section 12.09 and Ordinances 1744, 1745, 1821, 1822, 1828, 1951 and 1952. Such injury is and will be irreparable.

Arvida's prayer for relief (p. 11) states:

WHEREFORE, Arvida prays that the Court:

1. Enter a judgment under the provisions of Chapter 86, Florida Statutes, declaring Section 12.09 of the

> Boca Raton City Charter and Boca Raton Ordinances 1744, 1745, 1821, 1822, 1828, 1951 and 1952, to be void and unenforceable both on their face and as applied to Arvida's property.

Yet in the pretrial stipulation Arvida "contends . . . that these Ordinances Nos. 1744 and 1745 (adopted November 14, 1972) are in effect with respect to these properties ('R1D' zoning at a density of 5.28 units per acre)" (PTS.2)

Thus, without amending its complaint, Arvida now seeks to reverse its position and obtain an opposite result—not invalidation but validation of Ordinances 1744 and 1745—a position simply not borne out by the pleadings. At the same time Arvida now asserts the ordinances are valid, it continues to assail them in an appeal from this court's prior estoppel judgment.

Although these ordinances may not be "expressly" cap-related, they grew from the fervent desire of Boca Raton's citizens to drastically lower the pre-cap density of their city. That a low density profile was the unswerving goal of Boca Raton's residents is best demonstrated by repeal of Ordinances 1632 and 1633 pursuant to referendum petition in February 1972. Ordinances 1632 and 1633 are the very ordinances that Arvida's complaint sought to revive.[2]

Arvida finds itself "between a rock and a hard place". If Arvida's reasoning is followed to logical conclusion and the cap and all subsequent ordinances (including single family) are invalid, then Arvida's Parcel A returns to its pre-cap category of R1A with pre-cap density of 3.6 d.u.p.a.

To avoid that result, Arvida urges the Boca Villas judgment applies to everything except Ordinances 1744 and 1745, a concept the court does not accept as valid.

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2. Arvida's only other specific prayer for relief is "Compel Boca Raton to rezone Parcel A not more restrictively than as zoned under previous ordinances 1632 and 1633".

Based upon the foregoing, it is

ORDERED AND ADJUDGED:

1. The city has the naked power under Section 2 of Article VIII of the Florida Constitution to legally utilize a form of cap to control growth. In so ruling, the court specifically adopts by reference all the findings of fact and conclusions of law found in the Boca Villas judgment as well as those previously noted in this judgment. The court therefore finds Section 12.09 of Boca Raton's Charter violates Florida and Federal Constitutional guarantees of due process and is void and of no further force and effect.

2. The multi-family densities imposed under Boca Raton Ordinance 1952 and its predecessors beginning with Ordinance 1733 have no other reason for existence than to implement Charter Section 12.09. Zoning densities in effect prior to November 7, 1972, are accordingly in force and effect with regard to plaintiff's property zoned for multi-family residential uses; provided nothing herein shall prohibit the city from adopting other zoning laws and related measures so long as they substantially and rationally promote the public health, safety, and welfare without unnecessary abridgement of private property rights.

3. The single family zoning densities imposed under Boca Raton Ordinance 1951 and its predecessors beginning with Ordinance 1828 have no other reason for existence than to implement Charter Section 12.09 and are therefore void and of no further force and effect. The zoning densities in effect prior to November 7, 1972 are accordingly in force and effect with regard to Plaintiff's property zoned for single-family residential uses.

4. Arvida is presently estopped to assert in this cause validity of Ordinances 1744 and 1745 because Arvida's complaint (as well as that complaint before the Federal Court) asserts invalidity of those ordinances.

5. The court retains jurisdiction to carry out the terms of this judgment. Costs, if any, shall be awarded after motion with notice.

DONE AND ORDERED at West Palm Beach, Florida, this 17th day of February, 1977.

/s/ Thomas E. Sholts
Thomas E. Sholts, Circuit Judge

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CONSTITUTION OF FLORIDA 1968

SECTION 2. Municipalities. - Article VIII, Section 2(b)

(b) POWERS. Municipalities shall have the governmental, corporate and prorietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for the municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective.

* * *

FLORIDA STATUTES

Florida Municipal Home Rule Powers Act

§166.021 Powers

(1) As provided in article VIII, section 2(b) of the state constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.

(4) The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home powers granted by the Constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purpose not expressly prohibited by the Constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited.

* * *

Florida Local Government Comprehensive Planning Act §163.3167 (1) (a)

(1) The several incorporated municipalities, the several counties, and certain special districts or local governmental entities set out in this act shall have power and responsibility:

(a) To plan for their future development and growth.

§163.3181 Public participation in the comprehensive planning process; Intent

(1) It is the intent of the Legislature that the public participate in the comprehensive planning process to the fullest extent possible. Towards this end, local planning agencies and local governmental units are directed to adopt procedures designed to provide effective public participation in the comprehensive planning process and to provide real property owners with notice of all official actions which will regulate the use of their property. The provisions and procedures required in this act are set out as the minimum requirements towards this end.

* * *

Florida Environmental and Land Management Act
§380.021 Purpose

It is the legislative intent that, in order to protect the natural resources and environment of this state as provided in §7, Art. II of the state constitution, insure a water management system that will reverse the deterioration of water quality and provide optimum utilization of our limited water resources, facilitate orderly and well-planned development, and protect the health, welfare, safety, and quality of life of the residents of this state, it is necessary adequately to plan for and guide growth and development within the state. In order to accomplish these purposes, it is necessary that the state establish land and water management policies to guide and coordinate local decisions relating to growth and development; that such state land and water managements through existing processes for guidance of growth and development; and that all the existing rights of private property be preserved in accord with the constitutions of this state and the United States.

Supreme Court, U.S.
FILED
JUN 5 1980
MICHAEL RODAK, JR., CLERK

No. 79-1725

In the Supreme Court of the United States

October Term, 1979

CITY OF BOCA RATON,
Petitioner,

vs.

BOCA VILLAS CORPORATION, and SAMUEL FLETCHER, Trustee, and KEATING-MEREDITH PROPERTIES, INC., and ARVIDA CORPORATION,
Respondents.

RESPONSE OF ARVIDA CORPORATION TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

RESPONSE OF ARVIDA CORPORATION TO PETITION FOR WRIT OF CERTIORARI

Arvida Corporation, Respondent, prays that the petition of the City of Boca Raton for a writ of certiorari be denied, for the reasons set forth in this brief.[1]

1. The following abbreviations will be used:
"A....." . . . . . for the appendix to the petition filed by the City.
"RA....." . . . . . for the appendix to this brief of Respondent, Arvida Corporation.
All emphasis in this brief is supplied by counsel.

OPINIONS BELOW

The findings of fact and conclusions of law entered by the trial court in the *Boca Villas* case are reported. *Boca Villas Corp., et al. v. Pence, et al.*, 45 Fla. Supp. 65 (11th Cir. 1976). The denial of certiorari by the Florida Supreme Court is now reported. *City of Boca Raton v. Arvida Corp.*, 381 So.2d 765 (Fla. 1980); *City of Boca Raton v. Boca Villas Corp.*, 381 So.2d 765 (Fla. 1980).

QUESTIONS PRESENTED

1. Do the decisions below rest on an independent and adequate basis in state law?

2. Do the decisions below present substantial questions of federal law?

CONSTITUTIONAL PROVISIONS INVOLVED

Florida Constitution, Art. VIII, §2(b) (1968):

> POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective.

Florida Constitution, Art. I, §9 (1968):

> DUE PROCESS. No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

RESPONDENT'S STATEMENT OF THE CASE

In November 1972, the voters of Boca Raton, Florida, amended their City Charter by the initiative and referendum process to provide that no more than 40,000 dwelling units could ever be built in the City. The City's existing comprehensive plan and zoning ordinances would have permitted a total of 63,000 units, including some 45,000 yet-unbuilt units on vacant properties and 18,000 units already in existence. The City Council therefore was "compelled," in the trial court's words, to implement the "cap" by enacting across-the-board density reductions, averaging 50 percent in the various residential zoning classifications. (A.27). In this manner, approximately one-half of the future dwellings were eliminated.

The City Council had no opportunity to consider the appropriateness of these across-the-board density changes in relation to any particular property. Indeed, the trial court found they might reasonably relate "to the properties or areas involved" only "by pure accident." (A.27).

Beginning in 1957, the City's planning staff and consultants had worked toward, and had achieved, a low-density master plan which included "[s]tringent environmental and aesthetic legislation" (A.21-22), and was termed "second to none." (A.23). This master plan and existing zoning ordinances were unaffected by the "implementing ordinances," except that permissible densities (dwelling units per acre) were reduced in each residential zoning classification.

Arvida Corporation, owner of 2,300 acres of undeveloped residential property, filed suit in the United States District Court immediately after passage of the "cap." Sixteen months later, the District Court abstained from the exercise of its jurisdiction and directed Arvida to file suit

in Florida State Court for the resolution of one issue: whether the dwelling unit "cap" was beyond the power of municipal governments *under the Florida Constitution.* Arvida filed such a suit, expressly reserving all federal issues for determination by the federal court. (A.41-42).

Two other landowners, Boca Villas Corporation and Keating-Meredith Properties, Inc., had filed suit initially in Florida State Court, asserting both state and federal constitutional claims. Their cases were tried soon after Arvida's case was filed, resulting in a consolidated judgment invalidating the cap and certain of the implementing ordinances which affected their properties. The trial court's opinion found there was no rational relationship between the "cap" and any permissible municipal objective, and therefore found violations of "Florida and Federal constitutional guarantees of due process." (A.39). All zoning densities were ordered returned to their pre-"cap" status, and the City was expressly encouraged by the court to try again. *Id.*

As trial approached in Arvida's remaining case under the state constitution, the City and Arvida agreed to adopt by reference all the evidence, findings of fact, and conclusions of law in the earlier case, to be applied in Arvida's case. (A.43). After a one-day presentation of additional evidence, judgment was entered. (A.41). The trial court's opinion specifically noted that Arvida's complaint "reserve[d] federal constitutional issues for determination by the federal court and limit[ed] the cause before this court to municipal power under Section 2 of Article VIII of the Florida Constitution." (A.41-42). The court then summarized its findings and conclusions in the earlier *Boca Villas* case and relied upon them to hold, "the specific limitation of city size to 40,000 dwelling units does not bear a rational relationship to any permissible municipal objective." (A.45).

The City appealed both judgments to the Florida District Court of Appeal, Fourth District. The Florida Court's opinion in *Boca Villas* reviewed what it termed "an exhaustive final judgment holding the charter amendment violated due process provisions of the State *and* Federal constitutions. . ." (A.3). The court, citing no federal case, held, "there is substantial competent evidence to support the finding of an absence of a rational relationship regarding the charter amendment and zoning ordinance." *Id.* The court also interpreted Florida law to hold that such an arbitrary enactment was invalid if it unreasonably impacted upon private property rights, whether or not its effect was economic confiscation. (A.7-11).

In Arvida's case, the only issue presented to the appeals court was whether the record supported the trial court's conclusion that the cap was beyond the scope of municipal power *under the Florida Constitution.* The court held:

> "In the *Boca Villas* case we affirmed the trial judge's decision, holding the charter amendment and implementing ordinances to be arbitrary, because they bore no substantial relation to a permissible municipal purpose. *What we said there is equally applicable here and need not be repeated.*" (A.16).

The City applied to the District Court of Appeal for rehearing in both cases, contending that the court had mistakenly applied a "compelling need" standard to reach its decisions, in conflict with previous reported Florida cases. (RA. 13; 21). The motions were denied without opinion. (RA. 29; 30).

The City then applied to the Florida Supreme Court for a writ of certiorari, again asserting conflict between the "cap" decisions and other reported Florida cases. (RA. 31). On January 30, 1980, that Court denied certiorari without opinion.

REASONS FOR DENYING THE WRIT

I. The Court Is Without Jurisdiction Because the Judgments of the Florida State Courts Rest on Adequate and Independent State Grounds.

This Court, "from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn,* 324 U.S. 117, 125 (1945). In order for jurisdiction to exist, it must appear that decision of the federal issue was necessary to the judgment below. *Lynch v. Pierson,* 293 U.S. 52, 54 (1934). The "obvious" reason for this principle is that the Court's "power is to correct wrong judgments, not to revise opinions." If the same judgment would be rendered by the state court after its views of federal law were corrected, then this Court's review "could amount to nothing more than an advisory opinion." *Herb, supra,* 324 U.S. at 126.

Although the opinion of the State Court of Appeals in *Boca Villas* contained one reference to "the State and Federal Constitutions" (A.3), it is apparent that the court premised its decision upon the Florida Constitution. The opinion relied in large part upon previous Florida cases, *Burritt v. Harris,* 172 So.2d 820 (Fla. 1965) and *Davis v. Sails,* 318 So.2d 214 (Fla. 1st D.C.A. 1975). The opinion cited no particular provision of the United States Constitution, and no decision of any federal court.

In *Jankovich v. Indiana Toll Road Commission,* 379 U.S. 487 (1965), the Indiana Supreme Court invalidated a city's airport zoning ordinance, holding it was "a taking of private property for public use in violation of the provisions of Article I, Section 21 of the Indiana Constitution *and* the 14th Amendment to the Constitution of the United

States." *Id.* at 489-490. On certiorari, this Court noted the Indiana Court "quite understandably did not analyze separately the effect of the two provisions but considered them together." Finding no indication that the Indiana decision was "based less forcefully on the Indiana Constitution than on the 14th Amendment," the Court held, "Under our settled decisions the state ground in this case must be regarded as an independent and adequate ground of decision, and we so hold." *Id.* at 491-492.

In the present case, the sole emphasis in the lower court's opinion is state law. The holding in *Jankovich*, therefore, should apply even more forcefully.

Moreover, because of the unusual procedural history of this case, there is absolutely no doubt that the Florida constitutional ground is both an adequate and an independent basis for decision. Arvida's complaint below raised *only* the state issue, and both the trial court and the appeals court treated this issue as having been decided by their earlier decisions in *Boca Villas*. Thus, even if *Boca Villas* were construed as expressing an opinion about federal law, the Courts below were able to utilize its state law holding as the independent, determinative factor in the *Arvida* case.

Any suggestion by the City that the state and federal issues are "interwoven," or that the case should be remanded to the state court to clarify the basis of its decision, *see Minnesota v. National Tea Co.*, 309 U.S. 551 (1940), should be rejected. The Court uses the remand procedure only when necessary "to protect [its] jurisdiction when . . . given reasonable grounds to believe it exists." *Herb v. Pitcairn, supra,* 324 U.S. at 128. In other words, it must appear from the record that the state court "felt constrained to rule as it did" because of the federal constitution. *National Tea, supra,* at 555.

There is no indication in the opinions of the Florida Court of Appeal that the Court even considered the federal constitution as a basis for decision, much less felt "constrained" to rule a certain way because of it. Therefore, this Court is without jurisdiction.

II. The Record Does Not Present a Substantial Federal Question.

In the absence of a violation of a fundamental right or a suspect classification, this Court has unequivocally announced that it will no longer engage in substantive due process analysis—the balancing of a statute's impact upon private rights against the state interest fostered by the statute. *Whalen v. Roe,* 429 U.S. 589 (1977); *North Dakota v. Snyder's Drug Stores, Inc.,* 414 U.S. 156 (1973); *Ferguson v. Skrupa,* 372 U.S. 726 (1963). Of course, a state court may do so in interpreting its own constitution. The state constitution may impose, for example, a greater protection for private property rights than does the federal constitution, so long as such an interpretation does not directly violate a specific federal constitutional provision. *North Dakota v. Snyder's Drug Stores, supra,* 414 U.S. at 167; *cf., Oregon v. Hass,* 420 U.S. 714, 719 (1975); *Cooper v. California,* 386 U.S. 58, 62 (1967). It is "fundamental that state courts be left free and unfettered . . . in interpreting their state constitutions." *Minnesota v. National Tea Co.,* 309 U.S. 551, 557 (1940).

When a matter is thus foreclosed by prior decisions of this Court, no substantial federal question is presented. *See Palmer Oil Corp. v. Amerada Petroleum Corp.,* 343 U.S. 390 (1952); *Equitable Life Assurance Society v. Brown,* 187 U.S. 308 (1902). Under *Whalen, Snyder's Drug Stores,* and *Ferguson, supra,* the City must urge the violation of a specific federal right in order to present a case of sufficient importance to warrant this Court's attention.

Citing *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), the City alludes to its citizens' right to vote and legislate by referendum. However, no one has been denied the right to vote; the net result of the referendum process is legislation, judged by the same constitutional standards as an act of the legislature. The City acknowledges this. (Certiorari Petition at page 19); *see Eastlake, supra,* 426 U.S. at 676 ("If the substantive result of the referendum is arbitrary and capricious, *bearing no relation to the police power,* then the fact that the voters of Eastlake wish it so would not save the restriction.").

Finally, Boca Raton's contention that the Florida Courts applied a "compelling need" standard and failed to apply the "fairly debatable" rule, contrary to previous Supreme Court decisions, is plainly refuted by the operative language in the appeals court's *Boca Villas* opinion:

> As we mentioned above the trial judge found the charter amendment (the Cap) and the implementing zoning ordinances did not bear a rational relationship to a valid municipal purpose and that the ordinances were confiscatory as applied to appellees' property. Our study of the briefs and record convinces us that there is substantial competent evidence to support the finding of an absence of a rational relationship regarding the charter amendment and zoning ordinance.
>
> * * *
>
> "*That is not to say that there must be an absolute necessity requiring the enactment of certain zoning restrictions before they can be tolerated as a proper exercise of the police power.* But, as here, an excessive restriction on the use of private property which does not contribute substantially to the public health, mor-

als, safety and welfare is arbitrary and unreasonable and thus unconstitutional. *Davis v. Sails*, 318 So.2d 214 (Fla. 1st D.C.A. 1975).

* * *

"[I]f it had become appropriate for us to consider the propriety of the trial court's action in the light of the fairly debatable rule,[2] we would affirm the judgment because, as we mentioned earlier, even though there was expert testimony adduced in support of the City's case, that in and of itself does not mean the issue is fairly debatable. If it did, every zoning case would be fairly debatable and the City would prevail simply by submitting an expert who testified favorably to the City's position. Of course that is not the case. The trial judge still must determine the weight and credibility factors to be attributed to the experts. Here the final judgment shows that the judge did not assign much weight or credibility to the City's witnesses." (A.7-8; 12).

The trial court heard 27 days of evidence and concluded the "cap" was irrational. The appellate Court, applying the correct standard as enunciated in *Eastlake* and in scores of Florida decisions, found more than sufficient evidence to support this conclusion. There is no substantial federal right to be vindicated by the Supreme Court's intervention.

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2. The District Court of Appeal held that the entire scheme to limit the City to 40,000 dwelling units was irrational. Since the "implementing" ordinances were enacted for the express purpose of carrying out the "cap," the court found no need to assess their impact upon specific properties under the "fairly debatable" rule.

CONCLUSION

The petition for writ of certiorari should be denied.

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APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FOURTH DISTRICT
CASE NO. 77-533

CITY OF BOCA RATON,
Appellant,

vs.

ARVIDA CORPORATION,
Appellee.

PETITION FOR REHEARING OR IN THE ALTERNATIVE TO CERTIFY CERTAIN QUESTIONS TO THE FLORIDA SUPREME COURT

The decision rendered herein substantially depends upon the decision rendered by this Court on April 18, 1979 in *City of Boca Raton v. Boca Villas Corporation, et al.*, Case No. 76-2322. Therefore this Petition for Rehearing or in the alternative, to certify questions to Florida Supreme Court filed by the City of Boca Raton (hereinafter City) pursuant to Florida Rules of Appellate Procedure 9.330 and 9.030(a)(2)(A)(ii) raises exactly the same issues except where different facts require different statements and questions. The Court overlooked and failed to consider the following:

1. In finding "that the cap lacks *any* rational relationship to a permissible municipal objective" the Court applied the wrong standard of "compelling need" or "substantial need" or "compelling reason" for the exercise of the CITY's police power (p. 5, 3).[1] The Court misappre-

1. References are to pages of the Boca Villas opinion.

PREVIOUS PAGE WAS BLANK

hended the meaning of "necessity" as it relates to the zoning power of a city. See, e.g., *City of St. Petersburg v. Vinoy Park Hotel Co.*, 352 So.2d 149 (Fla. 2d DCA) for discussion of the meaning of the word "need" as it relates to legislative acts of a City.

2. If this Court requires the City to prove "compelling need", a substantial "need", or any necessity therefor before it can exercise its police power of zoning, this Court has erroneously shifted the burden of proof to the City. It is well established Florida law that the "heavy" or "extraordinary" burden of proof is on the plaintiffs - not the City. E.g. *City of Miami v. Silver*, 67 So.2d 646, 647 (Fla. 1953).

If the test of the rationality of the cap is "real necessity" or "compelling need" as opposed to community choice, there would be no basis for any city, no matter how sophisticated its land planning, to uphold a low density plan where natural resources exist to physically support higher density. It would then follow that a community that has sufficient land and water must accept whatever density and rate of growth is to be imposed upon a city by developers. Viewed in this light, the issue is surely not only one of great public interest but of adverse public interest contrary to the established law of Florida.

3. *Burritt v. Harris*, 172 So.2d 820 (Fla. 1965), relied on at page 5, has been expressly receded from in *City of St. Petersburg v. Aiken*, 217 So.2d 315 (Fla. 1968) especially as to upon whom the burden of proof rests.

4. Arvida's complaint[2] carefully avoided the issue of confiscation and alleged generally 1) that the City lacked

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2. The opinion herein is directed only to Count I (R 1-10). Count II (estoppel) was decided adversely to Arvida in *Arvida v. City of Boca Raton* by this Court in Case No. 76-2141.

power to enact the cap (R 10) and 2) irreparable injury because the number of dwelling units that could be built on its recently annexed land had been substantially reduced by the cap 3) *no* reference was made to arbitrariness or irrationality (R 1-10).

This Court held that the dwelling units in the single family categories were conformed to the average of what had been constructed prior to the charter amendment (Opinion herein, page 1). It cannot be denied that this purpose bears a most rational relationship to the stated permissible municipal objectives of preservation of integrity of neighborhoods, control of density, planning for future growth, and re-establishment of a balanced community.

In view of those incontrovertible facts, this Court's refusal to apply the confiscation or fairly debatable criteria in determining the validity of the cap and its implementing ordinances as specifically applied to Arvida's property is obvious judicial error under the established Florida law, since Arvida did not meet its burden of proof.

5. The cause herein was not a class action; - therefore, it was error for the trial judge to invalidate many ordinances not brought before him since they were inapplicable to the property over which he had jurisdiction and plaintiff had no standing to attack them. It is undenied and undeniable that included in the trial court's sweeping destruction of the CITY's entire residential zoning were many ordinances that were not cap-related but were remedial or "corrective".[3]

For example, Arvida's complaint attacked only five post cap ordinances, 1821, 1822, 1828, 1951 and 1952 (R 52-

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3. See Arvida's Complaint (p. 8).

71).[4] Ordinance 1828 is entirely different from the others relating only to interim and permanent densities. Ordinance 1828 contains an extensive revision of the single family zoning district regulations "for the purpose of implementing the Comprehensive Plan of the City of Boca Raton" and establishes single family and multi-family residential districts, business and commercial districts, industrial districts and miscellaneous districts (R 59-68). The interim densities were superseded by subsequent Ordinances 1951 and 1952. Arvida did not attack nor did the trial court consider those portions of Ordinance 1828 that were not cap-related and were inapplicable to Arvida. Instead the Court struck down *all* ordinances between 1828 and 1952 although Arvida did not bring those ordinances before the Court, and had no standing to do so since many provisions thereof were inapplicable to Arvida's property.

Contrary to this Court's opinion (p. 8), it was essential to specifically pass upon the propriety of the trial court's finding that the invalidated single family ordinances were confiscatory or not fairly debatable as applied to Arvida's property.

6. The trial court's order was directly contrary to the undeniable evidence that the Flood Control District determined the City's present water supply is dependent on its water budget (p. 4) [DX 2; R XIV, p 61-64, 71, 85, 94-96]. The City's water budget, and all the unrefuted evidence pertaining thereto, alone justifies a 40,000 cap at this time. Neither this Court nor the trial court can disregard that unrefuted evidence in evaluating the reasonableness of the imposition of the cap or if the cap is invalid, the reasonableness of the subsequent ordinances as they affected the land to which said ordinances are applicable.

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4. Ordinance 1821, 1822 were interim measures that have expired or been superseded by 1951 and 1952.

Florida East Coast Railway v. Michini, 139 So.2d 452, 458 (Fla. 2d DCA).

7. The trial court's broad sweeping destruction of the City's entire residential zoning where most of the invalidated ordinances were not before him violates the rule of judicial restraint and creates chaos within the City. But more significantly, this Court's ambiguous affirmance thereof without utilizing the well established criteria of fairly debatable or confiscation compounds that mischievous ambiguity and creates conflict in the zoning law of Florida. Therefore, since this was not a class action the cause should be remanded with instructions to the trial court 1) to reconsider the broad sweeping effect of his order on *all* single family residential ordinances 2) and to receive further evidence or otherwise evaluate or determine which specific ordinances are affected and to what extent. *Cf. Euclid v. Ambler*, 272 U.S. 365 (1926).

8. In reliance on *State v. DuBose*, 99 Fla. 812, 128 So. 4 (1930) to justify its refusal to use the test of confiscation to evaluate the propriety of the judgment below, this Court confused the questions before it. *DuBose* dealt with application of an unreasonable *use* classification—denial of a permit to build a jail in a neighborhood that did not prohibit that use. The question here is entirely different since it concerns the right of a city to enact zoning legislation that bears a rational relationship to municipal objectives that have been adjudicated constitutionally permissible such as community's choice for lower density. The reestablishment of a balanced community, the planning for future growth and development, preservation of its quality of life, protection of its known water supply. See *Watson, supra, Village of Belle Terre v. Boraas*, 416 U.S. 1536, *City of Eastlake v. Forest City Enterprises*, 96 S.Ct. 2358, *Town*

of Largo v. Imperial Homes, 307 So.2d 571 at 574, *Trachsel, supra.*

9. The public policy of Florida emphasizes the role of the community's choice, empowers each City to determine its own destiny and density, to preserve its quality of life as set forth in the constitution and statutes of Florida, to wit: Article VIII, Section 2(b) of the 1968 Florida Constitution, Florida Statutes Chapter 166 (Municipal Home Rule Powers Act), Chapter 380 (Florida Environmental Land and Water Management Act), Sections 163.3157 et seq. (Local Comprehensive Planning Act).

In the alternative, the City requests that this Court certify to the Florida Supreme Court the following questions of great public interest pursuant to Florida Appellate Rule 9.030(a)(2)(A)(ii):

QUESTIONS

The City includes all questions posed in its Petition for Rehearing or in the alternative, to Certify Questions filed simultaneously in *City of Boca Raton v. Boca Villas Corporation*, Case No. 76-2322, as if set forth verbatim and adds:

QUESTION EIGHT

CAN A COURT INVALIDATE A CITY'S ENTIRE SINGLE FAMILY RESIDENTIAL ZONING PLAN ON THE BASIS THAT IT IS ARBITRARY WHERE IT IS UNDENIED:

1. THAT THE ZONING IN SAID CATEGORIES CONFORMS TO THE AVERAGE OF WHAT HAD BEEN CONSTRUCTED IN THE CITY PRIOR TO THE CAP, AND

2. PLAINTIFF DID NOT ALLEGE NOR PROVE CONFISCATION.

QUESTION NINE

CAN A COURT INVALIDATE A CITY'S ENTIRE SINGLE FAMILY RESIDENTIAL ZONING PLAN ON THE BASIS THAT IT IS ARBITRARY WHERE IT IS UNDENIED:

1. THAT THE ZONING IN SAID CATEGORIES CONFORMS TO THE AVERAGE OF WHAT HAD BEEN CONSTRUCTED IN THE CITY PRIOR TO THE CAP, AND

2. PLAINTIFF DID NOT ALLEGE NOR PROVE THAT THE VALIDITY OF SAID ORDINANCES WAS NOT FAIRLY DEBATABLE AS APPLIED TO ITS PROPERTY.

Respectfully submitted,

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By: /s/ Gerald F. Richman
Gerald F. Richman

By: /s/ Bertha Claire Lee
Bertha Claire Lee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 3rd day of May, 1979 to: Mershon Sawyer Johnston Dunwody & Cole, 1600 First National Bank Bldg., Miami, Florida 33131; Thomas E. Hookano, Pacific Legal Foundation, 455 Capital Mall—Suite 465, Sacramento, California 95814 and William L. Earl, Peeples, Earl & Blank, P.A., One Biscayne Tower, Suite 3636, Miami, Florida 33131.

By: /s/ Bertha Claire Lee
Bertha Claire Lee

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT
CASE NO. 76-2322

CITY OF BOCA RATON,
Appellant,

vs.

BOCA VILLAS CORPORATION, a Florida corporation, and SAMUEL FLETCHER, Trustee, and KEATING-MEREDITH PROPERTIES, INC.,
Appellees.

PETITION FOR REHEARING OR IN THE ALTERNATIVE TO CERTIFY CERTAIN QUESTIONS TO THE FLORIDA SUPREME COURT

Pursuant to Florida Rules of Appellate Procedure 9.330 and 9.030(a)(2)(A)(ii), the CITY OF BOCA RATON (hereinafter the City) petitions this Court to rehear its decision rendered in this cause or in the alternative to certify certain questions to the Florida Supreme Court. The Court overlooked and failed to consider the following:

1. In finding "that the cap lacks *any* rational relationship to a permissible municipal objective" the Court applied the wrong standard of "compelling need" or "substantial need" or "compelling reason" for the exercise of the CITY's police power (p. 5, 3).[1] The Court misapprehended the meaning of "necessity" as it relates to the zoning power of a city. See, e.g., *City of St. Petersburg v. Vinoy Park Hotel Co.*, 352 So.2d 149 (Fla. 2d DCA) for discussion

1. References are to pages of the opinion herein.

of the meaning of the word "need" as it relates to legislative acts of a City.

2. If this Court requires the City to prove "compelling need", a substantial "need", or any necessity therefor before it can exercise its police power of zoning, this Court has erroneously shifted the burden of proof to the City. It is well established Florida law that the "heavy" or "extraordinary" burden of proof is on the plaintiffs - not the City. E.g. *City of Miami v. Silver,* 67 So.2d 646, 647 (Fla. 1953).

If the test of the rationality of the cap is "real necessity" or "compelling need" as opposed to community choice, there would be no basis for any city, no matter how sophisticated its land planning, to uphold a low density plan where natural resources exist to physically support higher density. It would then follow that a community that has sufficient land and water must accept whatever density and rate of growth is to be imposed upon a city by developers. Viewed in this light, the issue is surely not only one of great public interest but of adverse public interest contrary to the established law of Florida.

3. *Burritt v. Harris,* 172 So.2d 820 (Fla. 1965), relied on at page 5, has been expressly receded from in *City of St. Peterburg v. Aiken,* 217 So.2d 315 (Fla. 1968) especially as to upon whom the burden of proof rests.

4. The cause herein was not a class action; - therefore, it was error for the trial judge to invalidate many ordinances not brought before him since they were inapplicable to the property over which he had jurisdiction and plaintiffs had no standing to attack them. It is undenied and undeniable that included in the trial court's sweeping destruction of the CITY's entire multi-family residential

zoning were many ordinances that were not cap-related but were remedial.[2]

For example, Plaintiff Boca Villas' amended complaint upon which trial was based attacked only the cap and Ordinance 1763 changing the Boca Villas' tract from multi- to single family (R. 623).[3] Boca Villas did not even introduce Ordinance 1763 into evidence. It is incontrovertible that Ordinance 1763 is not cap related since action thereon had begun almost a year before the cap. (DX 25, T 33-5-192, T 33-5-198, T 30-63, 64, T 30-68, 69. Ord. 1973). The trial judge was not empowered to ignore that incontrovertible evidence. *Florida East Coast Railway v. Michini,* 139 So.2d 452, 458 (Fla. 2d DCA).

Contrary to its opinion (p. 8), it was essential for this Court to specifically pass upon the propriety of the trial court's finding that Ordinance 1763 was confiscatory or not "fairly debatable".

5. The trial court's order placing both BOCA VILLAS and KEATING-MEREDITH in the R-3 category, but granting BOCA VILLAS zoning "no more restrictive than 13 du/acre" and KEATING-MEREDITH 18 du/acre was itself unconstitutional (unequal protection) since it treated two owners in the same category differently.

6. The trial court's order was directly contrary to the undeniable evidence that the Flood Control District determined the City's present water supply is dependent on its water budget (p. 4) [R 3793-3832]. The City's water

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2. The same Walter Young, City Zoning and Planning Director, whose testimony this Court cites as basis for its affirmance (p. 3) stated that the Boca Villas property should be single family to conform to the City's plan (T 33-5-198).

3. Counts III and IV of the five count Amended Complaint (R 608-627). Counts I and II were moot by the time of trial since construction on that land had been completed by the time of trial. Count V had been dismissed.

budget, and all the unrefuted evidence pertaining thereto, alone justifies a 40,000 cap at this time. Neither this Court nor the trial court can disregard that unrefuted evidence in evaluating the reasonableness of the imposition of the cap or if the cap is invalid, the reasonableness of the subsequent ordinances as they affected the land to which said ordinances are applicable. *Michini, supra.*

7. The trial court's broad sweeping destruction of the City's entire residential zoning where most of the invalidated ordinances were not before him violates the rule of judicial restraint and creates chaos within the City. But more significantly, this Court's ambiguous affirmance thereof without utilizing the well established criteria of fairly debatable or confiscation compounds that mischievous ambiguity and creates conflict in the zoning law of Florida. Therefore, since this was not a class action the cause should be remanded with instructions to the trial court 1) to reconsider the broad sweeping effect of his orders on *all* multifamily ordinances enacted subsequent to the cap 2) and to receive further evidence or otherwise evaluate or determine which specific ordinances are affected and to what extent. *Cf. Euclid v. Ambler,* 272 U.S. 365 (1926).

8. In reliance on *State v. DuBose,* 99 Fla. 812, 128 So. 4 (1930) to justify its refusal to use the test of confiscation to evaluate the propriety of the judgment below, this Court confused the questions before it. *DuBose* dealt with application of an unreasonable *use* classification—denial of a permit to build a jail in a neighborhood that did not prohibit that use. The question here is entirely different since it concerns the right to a city to enact zoning legislation that bears a rational relationship to municipal objectives that have been adjudicated constitutionally permissible such as the community's choice for lower density, reestablishment of a balanced community, planning for future growth

and development, preservation of its quality of life, protection of its known water supply. See *Watson, supra, Village of Belle Terre v. Boraas,* 416 U.S. 1536, *City of Eastlake v. Forest City Enterprises;* 96 S.Ct. 2358, *Town of Largo v. Imperial Homes,* 307 So.2d 571 at 574, *Trachsel, supra.*

9. The public policy of Florida emphasizes the role of the community's choice, empowers each City to determine its own destiny and density, to preserve its quality of life as set forth in the constitution and statutes of Florida, to wit: Article VIII, Section 2(b) of the 1968 Florida Constitution, Florida Statutes Chapter 166 (Municipal Home Rule Powers Act), Chapter 380 (Florida Environmental Land and Water Management Act), Sections 163.3157 et seq. (Local Comprehensive Planning Act).

In the alternative, the City requests that this Court certify to the Florida Supreme Court the following questions of great public interest pursuant to Florida Appellate Rule 9.030(a)(2)(A)(ii):

QUESTION I

DOES THE CITY HAVE THE BURDEN OF PROVING A "REAL NECESSITY", "COMPELLING NEED", "SUBSTANTIAL NEED" OR "COMPELLING REASON" FOR THE EXERCISE OF ITS POLICE POWER OF ZONING OR REZONING?

QUESTION II

WHETHER "REAL NECESSITY" IS THE TEST OF THE VALIDITY OF ZONING MEASURES ENACTED AS A RESULT OF COMMUNITY CHOICE (CAP AND ITS IMPLEMENTING ORDINANCES) TO LOWER DENSITY, PLAN FOR FUTURE GROWTH, REESTABLISH A WELL BALANCED

COMMUNITY, PRESERVE THE INTEGRITY OF NEIGHBORHOODS, AND PRESERVE AND PROTECT ITS KNOWN WATER SUPPLY AND QUALITY OF LIFE?

QUESTION THREE

DO PLAINTIFFS HAVE STANDING TO ATTACK A CITY'S ENTIRE RESIDENTIAL SCHEME AS IT RELATES TO DENSITY, WHERE 1) NO CLASS ACTION HAS BEEN FILED, 2) MOST OF THE ORDINANCES INVALIDATED WERE NOT BROUGHT BEFORE THE COURT, 3) PLAINTIFFS HAVE NO INTEREST IN THE LANDS TO WHICH MANY OF SAID ORDINANCES ARE APPLICABLE?

QUESTION FOUR

IS A COURT EMPOWERED TO INVALIDATE A CITY'S ENTIRE RESIDENTIAL ZONING SCHEME BASED UPON THE CLAIM OF OWNERS OF TWO PARCELS OF LAND WHERE THE ACTION IS NOT BROUGHT AS A CLASS ACTION, OTHER PROPERTY OWNERS WERE NOT JOINED OR NOTIFIED, AND MOST OF THE ORDINANCES INVALIDATED WERE NOT BEFORE THE COURT?

QUESTION FIVE

WHERE PUBLIC POLICY AS SET FORTH IN FLORIDA'S CONSTITUTION AND STATUTES EMPOWERS A CITY TO DETERMINE ITS OWN DESTINY, MAY A COURT 1) IGNORE THE COMMUNITY'S CHOICE FOR LOW DENSITY AS EXPRESSED BY REFERENDUM, 2) FAIL TO APPLY

THE FAIRLY DEBATABLE RULE, 3) FAIL TO CONSIDER CONFISCATION AS TO ALL PROPERTY TO WHICH THE INVALIDATED ORDINANCES ARE APPLICABLE, 4) AND SHIFT THE BURDEN TO THE CITY TO PROVE "REAL" OR "COMPELLING" NECESSITY FOR THE QUESTIONED LEGISLATION?

QUESTION SIX

MAY A COURT APPLY A TEST OF "REAL NECESSITY" TO DETERMINE WHETHER A ZONING PLAN (THE CAP AND ITS IMPLEMENTING ORDINANCES), IS ARBITRARY OR UNREASONABLE THEREBY SHIFTING THE BURDEN OF PROOF TO THE CITY AND MAKING IT IMPOSSIBLE TO ENACT ZONING THAT ACCOMPLISHES THE CONSTITUTIONALLY PERMISSIBLE MUNICIPAL OBJECTIVES OF CONTROL OF DENSITY, FUTURE PLANNING, PRESERVATION OF INTEGRITY OF NEIGHBORHOODS, PROTECTION OF ITS WATER SUPPLY AND OTHER FACTORS?

or in the alternative,

QUESTION SEVEN

IN DETERMINING THE RATIONALITY OF THE QUESTIONED LEGISLATION WHERE THE MUNICIPAL PURPOSES TO BE SERVED HAVE BEEN ADJUDICATED CONSTITUTIONALLY PERMISSIBLE BY OTHER UNITED STATES SUPREME COURT AND FLORIDA APPELLATE COURT DECISIONS, ARE THE TRADITIONAL TESTS TO BE APPLIED CONFISCATION AND FAIRLY DEBATABLE AS APPLIED TO A PARTICULAR PIECE OF

PROPERTY AND/OR THE ENTIRE RESIDENTIAL PROPERTY OF A CITY

Respectfully submitted,

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By: /s/ Gerald F. Richman
Gerald F. Richman

By: /s/ Bertha Claire Lee
Bertha Claire Lee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 3rd day of May, 1979 to: Mershon Sawyer Johnston Dunwody & Cole, 1600 First National Bank Bldg., Miami, Florida 33131; Thomas E. Hookano, Pacific Legal Foundation, 455 Capital Mall—Suite 465, Sacramento, California 95814 and William L. Earl, Peeples, Earl & Blank, P.A., One Biscayne Tower, Suite 3636, Miami, Florida 33131.

By: /s/ Bertha Claire Lee
Bertha Claire Lee

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT
CASE NO. 77-533.

CITY OF BOCA RATON,
Appellant,

v.

ARVIDA CORPORATION,
Appellee.

May 25, 1979

BY ORDER OF THE COURT:

ORDERED that the May 3, 1979 Petition for Rehearing, or, in the alternative, to Certify Certain Questions to the Florida Supreme Court, is hereby denied.

I hereby certify the foregoing is a true copy of the original court order.

/s/ Clyde L. Heath
Clyde L. Heath,
Clerk

cc: Bertha Claire Lee, Esq.
Mershon Sawyer Johnston Dunwody & Cole
Thomas E. Hookano, Pacific Legal Foundation
Peeples, Earl & Blank, P.A.

cms

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT
CASE NO. 76-2322

CITY OF BOCA RATON,
Appellant,

v.

BOCA VILLAS CORPORATION, etc., et al.,
Appellee.

May 25, 1979

BY ORDER OF THE COURT:

ORDERED that the Appellant's May 3, 1979 Petition for Rehearing, or in the alternative to certify certain questions to the Florida Supreme Court, is hereby denied.

I hereby certify the foregoing is a true copy of the original court order.

/s/ Clyde L. Heath
Clyde L. Heath,
Clerk

cc: Gerald F. Richman, Esq.
Mershon Sawyer Johnston Dunwody & Cole
Thomas E. Hookano, Pacific Legal Foundation
William L. Earl, Esq.

cms

IN THE SUPREME COURT OF FLORIDA

CASE NO. 57154

CITY OF BOCA RATON,
Appellant,

vs.

BOCA VILLAS CORPORATION, a Florida corporation, and SAMUEL FLETCHER, Trustee, and KEATING-MEREDITH PROPERTIES, INC.,
Appellees.

CASE NO. 57155

CITY OF BOCA RATON,
Appellant,

vs.

ARVIDA CORPORATION,
Appellee.

BRIEF ON JURISDICTION

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Bertha Claire Lee
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The CITY OF BOCA RATON (CITY) invokes this Court's jurisdiction to review two decisions of the Fourth District Court of Appeal affirming the trial court's sweeping invalidation of the CITY's entire residential zoning plan on the basis that the CITY's 40,000 dwelling unit "cap" is arbitrary and unreasonable (A 1-10). The decisions below announce "*rule(s) of law* which conflict with rule(s) previously announced by this Court" and all Florida district courts of appeal. *Nielsen v. City of Sarasota*, 117 So.2d 731 (Fla.1960) (emphasis by the Court) and its recent progeny.

Unless this Court resolves these real and embarrassing conflicts, the unprecedented decisions *sub judice* produce confusion, ambiguity and chaos in the law of zoning and adversely affect every city in Florida.